IN THE
MISSOURI SUPREME COURT

MARK CHRISTESON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 85329
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF VERNON COUNTY, MISSOURI
TWENTY-EIGHTH JUDICIAL CIRCUIT, GENERAL DIVISION
THE HONORABLE DAVID DARNOLD, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Because death was imposed, this Court has exclusive jurisdiction of this Rule 29.15 appeal. Art. V, Sec. 3, Mo. Const.

INTRODUCTION

The State's case was premised on the credibility of co-defendant Carter's testimony in which he portrayed himself as a minor participant in the Brouks' deaths, while he portrayed Mr. Christeson as primarily responsible for their deaths. That portrayal was driven home in the prosecutor's arguments to the jury. Carter was endorsed as a witness only two weeks before trial. Counsel wanted to present evidence that Carter had a bad reputation for truth and veracity and a history of violence, stealing, and drug dealing, but did not investigate and present witnesses who would have told the jury this information. The jury never heard from witnesses who would have presented such evidence because counsel said they did not have time to do so.

In penalty, respondent called Vernon County Jail inmate Wagner to testify that while Mr. Christeson was held there he sodomized Wagner. Respondent also called jail inmate Milner to testify that he heard Mr. Christeson say to another jail inmate Michael Paul Gibbs '"Of course I did but they ain't got shit on me."' The jury never heard from Mr. Gibbs. Mr. Gibbs would have testified that Mr. Christeson never made the statement Milner attributed to him and denied having anything to do with killing the Brouks.

This Court should find counsel was ineffective because they failed to present readily available evidence that would have seriously called into question the veracity of the State's crucial witness, Carter. Moreover, counsel was ineffective because they failed to present evidence that would have rebutted the

statement Milner attributed to Mr. Christeson, whether it was intended to refer to the alleged sodomy of Wagner, the Brouk homicides, or some other unspecified conduct.

This Court should also find counsel was ineffective because counsel failed to take other actions which allowed the State to improperly bolster Carter's credibility and attack Mr. Christeson's defense. Counsels' actions considered together prejudiced Mr. Christeson. *See Gardner v. State*,96S.W.3d120,132-33(Mo.App.,W.D.2003) (counsel's error in calling witness when considered with other errors in overall performance constituted ineffective assistance).

STATEMENT OF FACTS

Mr. Christeson was convicted of three counts of first degree murder and sentenced to death on each count. *State v. Christeson*,50S.W.3d251(Mo.banc 2001). The case was tried in the Twenty-Eighth Circuit in Vernon County before Judge David Darnold in 1999 (R.L.F.306). Before the 29.15 case was commenced, Judge Darnold lost his re-election campaign in a contested election (R.L.F.306-07;Apr.R.Tr.4-38). Judge Darnold was appointed as a "Senior Judge" to hear the 29.15 case (R.L.F.10,307).

On April 20, 1998, respondent filed an information seeking to charge Mr. Christeson with having acted in concert with Jesse Carter to commit the murders of Susan, Adrain, and Kyle Brouk (T.L.F.44-48).[1] That information did not endorse Carter as a witness (T.L.F.44-48).

On August 11, 1999, two weeks before trial started, defense counsel learned respondent was endorsing Carter as a witness (T.L.F.433-34,437-40,443-47). On August 17, 1999, counsel deposed Carter (T.L.F.445). Counsel filed continuance requests based on their need to thoroughly investigate Carter's version of what took place and his reputation for veracity (T.L.F.437-40,443-47; Aug.'99Tr.2-22). The trial court heard argument and denied the continuance requests on August 18, 1999 (Aug.'99Tr.2-22). When trial began, counsel renewed their requests for a continuance which were denied (T.Tr.12-20).

[1] Because the victims all have the same last name, first names are used.

Throughout the trial counsel renewed their request for a continuance (T.Tr.765-68,949-50,1251,1393,1519). Most notably, before Carter testified counsel renewed their request for a continuance because of the need to investigate Carter (T.Tr.949-50). On appeal, this Court rejected the claim that raised the denial of a continuance on the grounds that there was no showing of what evidence would have developed if a continuance had been granted. *Christeson*,50S.W.3d at 262.

Counsel Leftwich was primarily responsible for penalty phase (Sept.R.Tr.120-21,239-40). Counsel McBride was primarily responsible for guilt phase (Sept.R.Tr.120-21,239-40).

Carter testified against Mr. Christeson in exchange for the State waiving the death penalty against him (T.Tr.962). Carter and Mr. Christeson are cousins (T.Tr.961). Carter and Mr. Christeson were living with their uncle David Bolin on "Bolin Hill" (Tr.856,963-64).

Carter testified that he and Mr. Christeson had planned that Mr. Christeson would have sex with Susan and they would take her Bronco to California (T.Tr.964-65,969). According to Carter, Mr. Christeson went in the Brouks' front door and motioned for Carter to follow (T.Tr.970). Carter testified that Mr. Christeson directed him to tie Susan's hands (T.Tr.972). Carter also tied up Adrian and Kyle (T.Tr.974). Carter represented that he stood guard over Adrian and Kyle with a shotgun, while Mr. Christeson used a shotgun to force Susan to have sex with him (T.Tr.975-80). Carter represented that after Mr. Christeson forced Susan to have sex, Carter then tied her hands with rope (T.Tr.980). One of

the aggravators the jury found, as to Susan, was that the offense occurred while Mr. Christeson perpetrated rape (T.L.F.557).

According to Carter, it was Mr. Christeson who decided that the Brouks had to be killed (T.Tr.981). Carter testified that they used the Brouks' Bronco to take them to a pond (Tr.981-86). Carter testified that at the pond, Susan said something that upset Mr. Christeson, who then kicked Susan in the stomach and chest (T.Tr.987). According to Carter, Susan fell to the ground and Mr. Christeson cut her throat (T.Tr.987-88). Carter characterized his role in Susan's death as providing Mr. Christeson with "a little help" (T.Tr.1016).

Carter testified that Mr. Christeson told him to cut Kyle's throat, but Carter refused (T.Tr.988). Carter claimed that during the time that he left to get a cinder block that Mr. Christeson had cut Kyle's throat (T.Tr.988-90). Carter also asserted that he refused to hold Kyle's feet as directed by Mr. Christeson (T.Tr.990). According to Carter, he saw Mr. Christeson hold Kyle's head underwater for five to six minutes (T.Tr.991). Carter asserted that all he did as to Kyle was push his body out into the water after he was dead (T.Tr.990-91).

While Carter left to get a second cinder block, he claimed he heard Mr. Christeson fire a gun (T.Tr.991-92). According to Carter, when he returned to the pond, Mr. Christeson was holding Adrian by her neck drowning her (T.Tr.992-93). Carter represented his only act in the homicide was to hold Adrian's feet while Mr. Christeson held her under water (T.Tr.993).

The prosecutor had Carter "summarize[e]" his testimony by having Carter state that he "did other things that [he was] told to do by Mr. Christeson to help him with these murders [.]" (T.Tr.1016-17).

Dr. Dix performed autopsies (T.Tr.908-09). Drowning was the cause of death for Susan and Kyle (T.Tr.915,919). Suffocation was the cause of Adrian's death (T.Tr.922).

During respondent's initial guilt argument, the prosecutor urged the jury to believe Carter's in-court story because when the police interrogated Carter they told Carter that they did not believe Carter's initial denials of involvement (T.Tr.1469-70).

During respondent's penalty rebuttal argument, the prosecutor told the jury that Carter was intellectually limited and only did the things that he did because Mr. Christeson had led him to do those things (T.Tr.1721). According to the prosecutor, Carter "never" would have committed these acts "on his own" (T.Tr.1721). The prosecutor's argument included that Mr. Christeson "lea[d] a weak man," Carter, "into murder" (T.Tr.1723). That action according to the prosecutor was part of "a predatory pattern" by Mr. Christeson (T.Tr.1723-24).

The jury did not hear evidence that would have contradicted the prosecutor's portrayal of Carter as merely following Mr. Christeson. Amanda and Kyle Burgess are brother and sister (Ex. 17 at 5; Ex. 19). Amber Burgess is Kyle's wife (Ex. 18 at 6). All testified in the 29.15 case.

Amanda Burgess knew that Carter had a bad reputation for truth and veracity (Ex. 17 at 7). She learned that information through her work for three years in the Explorers program with the St. Francois County Sheriff's Department (Ex. 17 at 7-10).

Amber Burgess (also referred to as Amber Williams Burgess - R.L.F.179, 928 and Amber Williams - T.L.F.445) had dated Carter (Ex.18 at 6-8). During that time, Carter had hit her hard enough to cause bruises (Ex. 18 at 9-10). Carter was a very controlling person (Ex. 18 at 10). He had chased her threatening her with a baseball bat (Ex. 18 at 12). When Amber refused Carter's sexual advances, he threatened her with a knife and only withdrew when he heard a noise in the house that scared him (Ex. 18 at 13-14). There was an incident where Carter tied up Amber, unzipped and pulled down her pants, and he only stopped there because he heard his sister come in when the door creaked (Ex. 18 at 13-14). After Carter was incarcerated, he wrote to Amber threatening her that if she became involved with anyone else or married, then when he was released he would kill her and her boyfriend or husband (Ex. 18 at 15).

Kyle Burgess knew Carter because they had lived in the same neighborhood (Ex. 19 at 13). Kyle knew that Carter had a bad reputation for truth and veracity (Ex. 19 at 13-14). Carter was known to have a reputation for stealing, drug dealing, and fights (Ex. 19 at 9, 13-14). Carter threatened to attack Kyle on numerous occasions and as frequently as two or three times per week (Ex. 19 at 9-10). Carter had threatened Kyle with his fists, a knife, and a rock (Ex. 19 at 10-

11). On one occasion, Carter actually attacked Kyle with a knife (Ex. 19 at 11-12). When Carter would threaten Kyle, he always brought along some of his friends (Ex. 19 at 14-15).

Christopher Pullen testified in the 29.15 case that when Pullen first met Carter, he tried to sell Pullen drugs (Sept.R.Tr.32). Pullen knew Carter was someone who was always threatening people and he had threatened Pullen (Sept.R.Tr.33-34). Carter had a reputation for getting into fights (Sept.R.Tr.34).

Before trial, in May, 1999, Leftwich moved to withdraw because respondent had endorsed a former client, Vernon County jail inmate, Michael Gibbs, for both phases (T.L.F.404-05;May'99Tr.11-12). Respondent had indicated to Leftwich that it intended to call another Vernon County jail inmate to testify that while in the Vernon County Jail he heard Mr. Christeson say to Gibbs: '"Of course I did it, but they can't prove it.'" (May'99Tr.11-12). Leftwich sought to withdraw on the grounds that if the respondent called Gibbs, then, as a former client, she could not cross-examine Gibbs about matters that she had learned about during her former representation of him (May'99Tr.12-13). Further, Leftwich requested to withdraw because if she decided that she wanted to call Gibbs to testify, then he would be subject to attack for bias because Leftwich had formerly represented him (May'99Tr.13-14). The trial court denied Leftwich's motion to withdraw (May'99Tr.30).

In penalty, respondent called Mike Wagner to testify that he had shared a cell at the Vernon County Jail with Mr. Christeson and that Mr. Christeson had

sodomized him (T.Tr.1547-48). Respondent also called Robert Milner who had shared the same cell with Wagner and Mr. Christeson (T.Tr.1571-72). Milner testified to circumstances in the cell he had shared with Wagner and Mr. Christeson that could have led the jury to believe the sodomy of Wagner occurred (T.Tr.1572-74). Milner also testified having heard Mr. Christeson say to Gibbs '"Of course I did but they ain't got shit on me."' (T.Tr.1575-76). This Court noted that the statement went unchallenged and it was unclear whether Mr. Christeson was referring to the homicides, the alleged sodomy committed against Wagner, or some other misconduct. *Christeson*, 50S.W.3d at 260.

This Court rejected the claim of error in denying Leftwich leave to withdraw. *Christeson*,50 S.W.3d at 260-61. This Court rejected Leftwich's concern about having to cross-examine Gibbs because respondent had agreed not to call Gibbs. *Christeson*,50S.W.3d at 260-61. Further, this Court rejected Leftwich's concerns about calling Gibbs as a defense witness because it was "pure speculation that Gibbs would have testified favorably for Christeson, and the defense made no offer of proof to that effect." *Christeson*,50S.W.3d at 261. This Court added that it found Leftwich's concern that respondent could gain some advantage through highlighting Leftwich's former representation "tenuous, at best." *Christeson*,50S.W.3d at 261.

Gibbs testified for the 29.15 case. While Gibbs was held at the Vernon County Jail, Mr. Christeson never made the statement Milner attributed to him (Ex. 28 at 8). Moreover, Mr. Christeson never confessed to Gibbs having

committed any crime (Ex. 28 at 8). Mr. Christeson did tell Gibbs that he had nothing to do with killing the Brouks (Ex. 28 at 8-9). Before trial, Gibbs told Leftwich that Mr. Christeson had not confessed to him and that what Milner reported was not true (Ex. 28 at 12-13). Gibbs, however, told Leftwich that he did not wish to testify (Ex. 28 at 13-14). The reason Gibbs did not want to testify was that a woman and children were the victims (Ex. 28 at 14). Gibbs' reluctance to testify had nothing to do with that charges were pending against him or just not wanting to get involved (Ex. 28 at 14). Gibbs was willing to testify at the 29.15 case because 29.15 counsel furnished Gibbs with information that made Gibbs want to give Mr. Christeson the benefit of the doubt that he may not be guilty of the crimes charged (Ex. 28 at 15). In particular, Gibbs was willing to testify at the 29.15 case because 29.15 counsel had informed Gibbs that a co-defendant was also charged and that Mr. Christeson had never given a confession (Ex. 28 at 16-17).

The 29.15 pleadings included claims that counsel was ineffective for failing to present evidence that was available to challenge Carter's version of events and the State's claim that Carter was a follower of Mr. Christeson (R.L.F.162-70) and to rebut Milner's testimony that he heard Mr. Christeson make inculpatory statements to Gibbs (R.L.F.153-54). The amended motion included additional claims (R.L.F.15-305).

After an evidentiary hearing, the motion court entered findings denying the 29.15 motion (R.L.F.772-941). This appeal follows.

POINTS RELIED ON

I. REBUTTING THE STATE'S EVIDENCE

The motion court clearly erred when it denied the claims counsel was ineffective for failing to call Kyle, Amber, and Amanda Burgess, and Christopher Pullen to testify about co-defendant Carter's bad reputation for truth and veracity, violent behavior history, reputation for drug dealing, and reputation for stealing because Mr. Christeson was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that this evidence would have significantly rebutted the State's and Carter's portrayal of him as having been led into committing the offenses and Mr. Christeson as being primarily responsible such that reasonably competent counsel under similar circumstances would have investigated and called these witnesses and he was prejudiced because there is a reasonable probability that Mr. Christeson would not have been convicted of first degree murder or alternatively the jury would have imposed life.

Alternatively, the motion court clearly erred in finding that it was not error to have denied counsel's request for a continuance because that ruling denied Mr. Christeson his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends, VIII and XIV, in that the evidence

presented at the 29.15 through these witnesses establishes what evidence would have been developed about Carter if a continuance had been granted.

Ervin v. State,80S.W.3d817(Mo.banc2002);

State v. Isa,850S.W.2d876(Mo.banc1993).

State v. Phillips,940S.W.2d512(Mo.banc1997);

Wiggins v. Smith,123S.Ct.2527(2003); and

U.S. Const. Amends. VI, VIII, and XIV.

II. MICHAEL GIBBS WOULD HAVE REBUTTED AGGRAVATING EVIDENCE

The motion court clearly erred when it denied the claim counsel was ineffective for failing to call Michael Gibbs to testify Mr. Christeson did not make the statement to him "Of course I did but they ain't got shit on me" and that Mr. Christeson told him that he had nothing to do with killing the Brouks to rebut Milner's testimony Mr. Christeson made that statement because Mr. Christeson was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that this evidence would have rebutted this aggravating evidence and reasonably competent counsel under similar circumstances would have called Gibbs. Mr. Christeson was prejudiced because there is a reasonable probability that the jury would have imposed life.

Eldridge v. Atkins,665F.2d228(8thCir.1981);

Ervin v. State,80S.W.3d817(Mo.banc2002);

Perkins-Bey v. State,735S.W.2d170(Mo.App.,E.D.1987);

Wiggins v. Smith,123S.Ct.2527(2003); and

U.S. Const. Amends. VI, VIII, and XIV.

III. FAILURE TO THOROUGHLY EXAMINE DR. CARTER

The motion court clearly erred in denying the claim that counsel failed to conduct a thorough examination of psychologist Dr. Patricia Carter, who conducted a competency to proceed evaluation of co-defendant Carter, failing to elicit that Carter reported that he has out-of-body experiences and believes he can travel like a spirit because Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances who called Dr. Carter as their witness would have elicited this information and Mr. Christeson was prejudiced because this information called into substantial question Carter's veracity about what he recounted happened such that Mr. Christeson would not have been convicted of first degree murder or at minimum would have been sentenced to life.

Barry v. State,850S.W.2d348(Mo.banc1993);

Hadley v. Groose,97F.3d1131(8thCir.1996);

State v. Pinkus,550S.W.2d829(Mo.App.,Spfld.D.1977);

Strickland v. Washington,466U.S.668(1984); and

U.S. Const. Amends. VI, VIII, and XIV.

IV. COUNSELS' FAILURES TO OBJECT

The motion court clearly erred when it denied the claims that counsel was ineffective for failing to properly object to and preserve the following:

A. The prosecutor's repeated questioning, related commentaries, and vouching during witness testimony that while Carter's prior statements were untruthful his trial testimony was truthful;

B. The prosecutor's repeated commentaries during Mr. Christeson's testimony that his testimony was untruthful;

C. Dr. Bland's testimony that Carter was competent to proceed to trial; and

D. The prosecutor's death qualification voir dire comments that at the end of the punishment making decision process the respondent was relieved of its proof beyond a reasonable doubt burden

because Mr. Christeson was denied effective assistance, due process, freedom from cruel and unusual punishment, and his right to remain silent and not incriminate himself, U.S. Const. Amends. V, VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances would have objected and Mr. Christeson was prejudiced as he would not have been convicted of first degree murder or at minimum sentenced to life.

Doyle v. Ohio,426U.S.610(1976);

State v. Dexter,954S.W.2d332(Mo.banc1997);

State v. Link,25S.W.3d136(Mo.banc2000);

State v. Newton,963S.W.2d295(Mo.App.,E.D.1998)

U.S. Const. Amends. V, VI, VIII, and XIV; and

§552.020.

V. APPELLATE COUNSEL'S INEFFECTIVENESS

The motion court clearly erred denying the claims direct appeal counsel was ineffective for failing to raise the trial court erred in: (a) sustaining respondent's objection to counsel's guilt phase closing argument that Dr. Dix's autopsy findings established Carter should not be believed; (b) overruling counsel's objection to Carter testifying to an alleged statement Susan Brouk directed at Mr. Christeson; (c) sustaining respondent's objections to counsel's guilt opening statement that respondent had recovered fingerprints that did not belong to Mr. Christeson or Carter and Carter recently changed his version of what happened because he had received a deal; and (d) finding Carter was competent to testify, because Mr. Christeson was denied his rights to effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent appellate counsel would have raised these claims and there is a reasonable probability Mr. Christeson's conviction would have been reversed.

State v. Barton,936S.W.2d781(Mo.banc1996);

State v. Bell,950S.W.2d482(Mo.banc1997);

State v. Newton,963S.W.2d295(Mo.App.,E.D.1998);

State v. Thompson,68S.W.3d393(Mo.banc2002); and

U.S. Const. Amends. VI, VIII, and XIV;

§552.020.

VI. MITIGATING EVIDENCE NOT PRESENTED

The motion court clearly erred when it denied the claims counsel was ineffective for failing to call Terry, Carmen, David, Joseph, Kevin, and Laura Bolin and Anna, Dale, and Jerry Christeson, and Kathleen Craig, Chester Bockover, Debbie Bullock, and Melissa Keeney to testify about Mr. Christeson's positive character traits which included that he was hardworking, trustful, truthful, not aggressive or violent, and got along well with and was helpful to others, and failed to present evidence of sexual and verbal abuse he suffered, because Mr. Christeson was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances would have called these witnesses and Mr. Christeson was prejudiced because there is a reasonable probability that the jury would have imposed life.

Butler v. State,108S.W.3d18(Mo.App.,W.D.2003);

Simmons v. Luebbers,299F.3d929(8thCir.2002);

Terry Williams v. Taylor,529U.S.362(2000);

Wiggins v. Smith,123S.Ct.2527(2003); and

U.S. Const. Amends. VI, VIII, and XIV

VII. DR. DRAPER - INCOMPLETE EVIDENCE

The motion court clearly erred when it denied the claims counsel was ineffective for failing to present testimony through Dr. Draper based on documents containing personal background information about Mr. Christeson and for failing to also admit into evidence those documents which dealt with his father's schizophrenia (Exhibits 42, 43, 44), the gravity of his mother's mental disabilities (Exhibit 37), Mr. Christeson's learning disabilities (Exhibit 35), and also failed to present through Dr. Draper evidence that Mr. Christeson was sexually abused and subjected to viewing altercations between his mother and William Christeson, because Mr. Christeson was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances would have presented all of this information through Dr. Draper and offered into evidence these documents and Mr. Christeson was prejudiced because there is a reasonable probability that the jury would have imposed life.

Kenley v. Armontrout,937F.2d1298(8thCir.1991);

Simmons v. Luebbers,299F.3d929(8thCir.2002);

Terry Williams v. Taylor,529U.S.362(2000);

Wiggins v. Smith,123S.Ct.2527(2003); and

U.S. Const. Amends. VI, VIII, and XIV.

VIII. JUDGE DARNOLD LACKED AUTHORITY TO SERVE

The motion court, Judge Darnold, clearly erred when he denied the motion to disqualify him on the grounds that he lacked constitutional or statutory authority to serve, in violation of Mo. Const. Art. I § 1, Art. V §§19 and 26, and §476.681 because he was not qualified to serve on a case in the Twenty-Eighth Judicial Circuit (Vernon County) because he was defeated after a contested election, and thereby, denied Mr. Christeson his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV and Mo. Const. Art. I § 10 and 21, in that Judge Darnold's appointment as a "Senior Judge" and service on a case in the Twenty-Eighth Judicial Circuit disregarded the intent of a majority of the voters in that Circuit who voted to elect his opponent such that Judge Darnold rendered a judgment in Mr. Christeson's case without either constitutional or statutory authority to serve on his case.

Barnes v. Bailey,706S.W.2d25(Mo.banc1986);

Nguyen v. United States,123S.Ct.2130(2003);

State v. Perkins,95S.W.2d75(Mo.banc1936);

U.S. v. Scott,260F.3d512(6thCir.2001);

U.S. Const. Amends. VIII and XIV; and

Mo. Const. Art. I §§1, 10, and 21, Art. V §§19, 26; and

§476.681.

IX. COUNSELS' INEFFECTIVENESS - RESPONDENT'S ARGUMENTS

The motion court clearly erred in denying the claims counsel was ineffective for failing to properly object to and fully preserve objections to respondent's improper arguments which included:

A. In penalty rebuttal respondent argued that Mr. Christeson had failed to acknowledge his responsibility even though Mr. Christeson had exercised his right not to testify in penalty and;

B. In guilt rebuttal references to different versions of a sign that appeared above Christ's head on the cross

because Mr. Christeson was denied his rights to effective assistance, due process, to not testify and incriminate himself, and freedom from cruel and unusual punishment, U.S. Const. Amends. V, VI, VIII, and XIV in that reasonably competent counsel under similar circumstances would have properly objected to these arguments and fully preserved these matters and there is a reasonable probability that Mr. Christeson would not have been convicted of first degree murder or at minimum been sentenced to life.

Deck v. State,68S.W.3d418(Mo.banc2002);

Owen v. State,656S.W.2d458(Tex. Crim. App.1983);

State v. Dexter,954S.W.2d332(Mo.banc1997);

State v. Whitfield,837S.W.2d503(Mo.banc1992); and

U.S. Const. Amends. V, VI, VIII, and XIV.

X. INEFFECTIVENESS ON INSTRUCTIONS

The motion court clearly erred in denying the claims that counsel was ineffective in failing to object to multiple instructional errors including the failure:

A. To request a "no adverse inference" to be drawn from Mr. Christeson not testifying in penalty instruction;

B. To give MAI-CR3d 313.46A, the instruction that death is never required, after the corresponding series of instructions for Counts I and II;

C. To object to guilt Instructions 6, 9, and 12 on the grounds these instructions did not make clear the jury must attribute deliberation to Mr. Christeson, and not Carter, to convict of first degree murder and the submission of converse Instructions 7, 10, and 13 which were similarly defective;

D. To object to Instruction 21, verdict director on aggravators for Susan Brouk's death, on the grounds that it does not make clear that a finding of depravity of mind must be premised on the acts and intent of Mr. Christeson and not Carter

in that Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, to not incriminate himself, and effective assistance of counsel, U.S. Const. Amends. V, VI, VIII, and XIV as reasonably competent counsel under similar circumstances would have ensured the jury was properly instructed and Mr. Christeson was prejudiced as there is a

reasonable probability he would not have been convicted of first degree murder or at minimum sentenced to life.

Carter v. Kentucky,450U.S.288(1981);

Estelle v. Smith,451U.S.454(1981);

State v. Mayes,63S.W.3d615(Mo.banc2001);

State v. Storey,986S.W.2d462(Mo.banc1999); and

U.S. Const. Amends. V, VI, VIII, and XIV.

XI. JUROR CONNER - AUTOMATIC DEATH JUROR

The motion court clearly erred when it denied the claim that counsel was ineffective for failing to strike Juror Conner who indicated that he would automatically impose death because Mr. Christeson was denied effective assistance, due process, right to a jury trial before a fair and impartial jury, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances would have moved to strike Conner and he was prejudiced because a juror who could not consider life served on his jury.

Butler v. State,108S.W.3d18(Mo.App.,W.D.2003);

Irvin v. Dowd,366U.S.717(1961);

Knese v. State,85S.W.3d628(Mo.banc2002);

Morgan v. Illinois,504U.S.719(1992); and

U.S. Const. Amends. VI, VIII, and XIV.

XII. RESPONDENT'S CHANGE IN RESPONSIBILITY THEORY

The motion court clearly erred when it denied the claim that respondent improperly presented inconsistent theories as to Mr. Christeson's involvement when it presented evidence at Mr. Christeson's trial that he cut Kyle Brouk's throat and then at Carter's trial presented evidence Carter did that act because Mr. Christeson was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that the State is prohibited from using inconsistent theories to obtain multiple convictions and punishments for the same offense.

Smith v. Groose,205F.3d1045(8thCir.2000);

State v. Carter,71S.W.3d267(Mo.App.,S.D.2002);

State v. Phillips,940S.W.2d512(1997);

Woodson v. North Carolina,428U.S.280(1976); and

U.S. Const. Amends. VIII and XIV.

XIII. GENERALIZED PENALTY OPENING AND CLOSING

The motion court clearly erred in denying the claim that counsel was ineffective in giving a generalized penalty opening statement and closing argument because Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, and to effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances would have given a comprehensive opening statement and closing argument that affirmatively explained why the mitigating evidence, considered in conjunction with the instructions, warranted life and Mr. Christeson was prejudiced because had counsel so acted there is a reasonable probability life would have been imposed.

Hall v. Washington,106F.3d742(7thCir.1997);

State v. Barton,936S.W.2d781(Mo.banc1996);

State v. Thompson,68S.W.3d393(Mo.banc2002);

Strickland v. Washington,466U.S.668(1984); and

U.S. Const. Amends. VI, VIII, and XIV.

XIV. RING VIOLATION

The motion court clearly erred denying Mr. Christeson's claim that the information only charged him with unaggravated and not aggravated first degree murder and that trial and appellate counsel were ineffective for failing to raise this matter because Mr. Christeson was denied his rights to due process, a jury trial, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that the information failed to plead any aggravating circumstances such that Mr. Christeson was charged with only unaggravated first degree murder whose only authorized punishment is life. Further, reasonably competent trial and appellate counsel would have raised this matter and he was prejudiced because life was the only authorized punishment.

Apprendi v. New Jersey,530U.S.466(2000);

Jackson v. Virginia,443U.S.307(1979);

Jones v. United States,526U.S.227(1999);

Ring v. Arizona,536U.S.584(2002);

U.S. Const. Amends. VI, VIII, and XIV; and

§§565.020 and 565.030.

XV. INADEQUATE PROPORTIONALITY REVIEW

The motion court clearly erred when it rejected the claim that Mr. Christeson was denied meaningful proportionality review, trial counsel was ineffective for failing to present evidence to challenge this Court's proportionality review, and appellate counsel was ineffective for failing to challenge that proportionality review, because Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, and to effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV in that this Court refuses to consider all similar cases and to employ a frequency analysis, there is a lack of notice of the procedure to be followed with a meaningful opportunity to be heard, and there is not a complete database as required under §565.035. Further, reasonably competent trial and appellate counsel under similar circumstances would have challenged this Court's review on all these grounds. Mr. Christeson was prejudiced because he was entitled to a life sentence.

Harris v. Blodgett,853F.Supp.1239(1994), affd., *Harris v. Wood*,64F.3d1432(9thCir.1995);

Palmer v. Clarke, 2003 WL 22327180 (Oct. 9, 2003 D. Neb.);

State v. Black,50S.W.3d778(Mo.banc2001);

State v. Davis,814S.W.2d593(Mo.banc1991);

U.S. Const. Amends. VI, VIII, and XIV; and

§565.035.

XVI. CLEMENCY ARBITRARINESS

The motion court clearly erred denying Mr. Christeson's claim that Missouri's clemency process violates his rights to due process, freedom from cruel and unusual punishment, and equal protection, U.S. Const. Amends. VIII and XIV, and that counsel was ineffective, U.S. Const. Amend VI, for failing to object to that process in that it is wholly arbitrary and capricious as the clemency of Darrell Mease evidences. Mease was granted clemency not on the merits of his case, but because of the Pope's appeal on religious grounds. Mr. Christeson was required to be sentenced to life because of this arbitrariness and counsel was ineffective for failing to assert this arbitrariness as grounds for requiring a life sentence.

Gregg v. Georgia,428U.S.153(1976);

Ohio Adult Parole Authority v. Woodard,523U.S.272(1998);

Duvall v. Keating,162F.3d1058(10thCir.1998);

State v. Mease,842S.W.2d98(Mo.banc1992); and

U.S. Const. Amends. VI, VIII and XIV.

XVII. JURORS DO NOT UNDERSTAND THE PENALTY INSTRUCTIONS

The motion court clearly erred in rejecting the claim that Mr. Christeson was denied his rights to effective assistance of counsel when counsel failed to present evidence to challenge the penalty phase jury instructions on the grounds that they fail to properly guide the jury as well as rejecting his claim that his rights to due process, a fair and impartial jury, and to be free from cruel and unusual punishment were violated when those instructions were given because Mr. Christeson was denied those rights, U.S. Const. Amends. VI, VIII, and XIV, in that the evidence presented established jurors do not understand the instructions and counsel unreasonably failed to present evidence to support a challenge and Mr. Christeson was prejudiced because the less jurors understand, the more likely they are to impose death.

Furman v. Georgia,408U.S.238(1972);

Gardner v. Florida,430U.S.349(1977);

State v. Deck,994S.W.2d527 (Mo.banc1999);

United States ex rel. Free v. Peters,806F.Supp.705(N.D.Ill.1992),*rev'd*.12F.3d 700(7thCir.1993); and

U.S. Const. Amends. VI, VIII, and XIV.

ARGUMENT

I. REBUTTING THE STATE'S EVIDENCE

The motion court clearly erred when it denied the claims counsel was ineffective for failing to call Kyle, Amber, and Amanda Burgess, and Christopher Pullen to testify about co-defendant Carter's bad reputation for truth and veracity, violent behavior history, reputation for drug dealing, and reputation for stealing because Mr. Christeson was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that this evidence would have significantly rebutted the State's and Carter's portrayal of him as having been led into committing the offenses and Mr. Christeson as being primarily responsible such that reasonably competent counsel under similar circumstances would have investigated and called these witnesses and he was prejudiced because there is a reasonable probability that Mr. Christeson would not have been convicted of first degree murder or alternatively the jury would have imposed life.

Alternatively, the motion court clearly erred in finding that it was not error to have denied counsel's request for a continuance because that ruling denied Mr. Christeson his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends, VIII and XIV, in that the evidence presented at the 29.15 through these witnesses establishes what evidence would have been developed about Carter if a continuance had been granted.

The motion court denied the claim that counsel was ineffective for failing to investigate and call Kyle, Amber, and Amanda Burgess, and Christopher Pullen to testify about co-defendant Carter's bad reputation for truth and veracity, violent behavior history, reputation for drug dealing, and reputation for stealing. Mr. Christeson was denied effective counsel, due process, and freedom from cruel and unusual punishment when these witnesses were not called. U.S. Const. Amends. VI, VIII, and XIV. They could have significantly rebutted the State's and Carter's portrayal of him as having been led into committing the offenses and Mr. Christeson as being primarily responsible. There is a reasonable probability that Mr. Christeson would not have been convicted of first degree murder or at a minimum would have been sentenced to life.

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

This Court has recognized that "One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*,80S.W.3d 817,827(Mo.banc2002) (citing *Bell v. Cone*,122S.Ct.1843(2002)). *See*, *also*, *Wiggins v. Smith*,123S.Ct.2527,2537(2003) (counsel has duty to investigate and rebut aggravating evidence); *Parker v. Bowersox*,188F.3d923,929-31(8thCir.1999) (counsel was ineffective for failing to present evidence that would have rebutted

aggravating circumstance that victim was a potential witness against Parker in two cases).

Carter portrayed Mr. Christeson as primarily responsible for the offenses. Likewise, respondent painted Mr. Christeson as having led Carter into participating in the offenses.

A. Carter's Testimony And Respondent's Portrayal

Carter testified that he and Mr. Christeson had planned that Mr. Christeson would have sex with Susan (T.Tr.964-65,969). According to Carter, Mr. Christeson went in the Brouks' front door and motioned for Carter to follow (T.Tr.970). Carter claimed that Mr. Christeson directed him to tie Susan's hands (T.Tr.972). Carter also tied up Adrian and Kyle (T.Tr.974). Carter represented that he stood guard over Adrian and Kyle with a shotgun, while Mr. Christeson used a shotgun to force Susan to have sex (T.Tr.975-80). Carter represented that after Mr. Christeson sexually assaulted Susan, Carter then tied her hands with rope (T.Tr.980).

According to Carter, it was Mr. Christeson who decided that the Brouks had to be killed (T.Tr.981). Carter testified that at the pond, Susan said something that upset Mr. Christeson, who then kicked Susan in the stomach and chest (T.Tr.987). According to Carter, Susan fell to the ground and Mr. Christeson cut her throat (T.Tr.987-88). Carter characterized his role in Susan's death as providing Mr. Christeson with "a little help" (T.Tr.1016).

Carter testified that Mr. Christeson told him to cut Kyle's throat, but Carter refused (T.Tr.988). Carter claimed that during the time that he left to get a cinder block that Mr. Christeson had cut Kyle's throat (T.Tr.988-90). Carter also asserted that he refused to hold Kyle's feet as directed by Mr. Christeson (T.Tr.990). According to Carter, he saw Mr. Christeson hold Kyle's head underwater for five to six minutes (T.Tr.991). Carter asserted that all he did as to Kyle was push his body out into the water after he was dead (T.Tr.990-91).

When Carter left to get a second cinder block, he claimed he heard Mr. Christeson fire a gun (T.Tr.991-92). According to Carter, when he returned to the pond, Mr. Christeson was holding Adrian by her neck drowning her (T.Tr.992-93). Carter represented his only act in the homicide was to hold Adrian's feet while Mr. Christeson held her under water (T.Tr.993)

The prosecutor had Carter "s ummarize[e]" his testimony by having Carter state that he "did other things that [he was] told to do by Mr. Christeson to help him with these murders [.]" (T.Tr.1016-17).

During respondent's initial guilt argument, the prosecutor urged the jury to believe Carter's in-court story because when the police interrogated Carter they told Carter that they did not believe Carter's initial denials of involvement (T.Tr.1469-70).

During respondent's penalty rebuttal argument, the prosecutor told the jury that Carter was intellectually limited and only did the things that he did because Mr. Christeson had led him to do those things (T.Tr.1721). According to the

prosecutor, Carter "never" would have committed these acts "on his own" (T.Tr.1721). The prosecutor's argument included that Mr. Christeson "lea[d] a weak man," Carter, "into murder" (T.Tr.1723). That action according to the prosecutor was part of "a predatory pattern" by Mr. Christeson (T.Tr.1723-24).

On all three counts, the jury found the following aggravators: (1) the homicide of one was committed during the course of two other homicides; and (2) depravity of mind (T.L.F.557-59). On the count involving Susan, the jury also found that the homicide was committed during a rape (T.L.F.557).

B. <u>The Truth About Carter</u>

Substantial evidence about Carter was presented in the 29.15 case which the jury never heard. Amanda Burgess knew that Carter had a bad reputation for truth and veracity (Ex. 17 at 7). She learned that information through her work for three years in the Explorers program with the St. Francois County Sheriff's Department (Ex. 17 at 7-10). In the Explorers program, Amanda received the same training deputies received and performed many of the same tasks they did (Ex.17 at 7-8).

Amber Burgess had dated Carter (Ex.18 at 6-8). During that time, Carter had hit her hard enough to cause bruises (Ex. 18 at 9-10). Carter was a very controlling person (Ex. 18 at 10). He had chased her threatening her with a baseball bat (Ex. 18 at 12). When Amber refused Carter's sexual advances, he threatened her with a knife and only withdrew when he heard a noise in the house that scared him (Ex. 18 at 13-14). There was an incident where Carter tied up

Amber, unzipped and pulled down her pants, and he only stopped there because he heard his sister come in when the door creaked (Ex. 18 at 13-14). After Carter was incarcerated, he wrote to Amber threatening her that if she became involved with anyone else or married, then when he was released he would kill her and her boyfriend or husband (Ex. 18 at 15).

Kyle Burgess knew Carter because they had lived in the same neighborhood (Ex. 19 at 13). Kyle knew that Carter had a bad reputation for truth and veracity (Ex. 19 at 13-14). Carter was known to have a reputation for stealing, drug dealing, and fights (Ex. 19 at 9, 13-14). Carter threatened to attack Kyle on numerous occasions and as frequently as two or three times per week (Ex. 19 at 9-10). Carter had threatened Kyle with his fists, a knife, and a rock (Ex. 19 at 10-11). On one occasion, Carter actually attacked Kyle with a knife (Ex. 19 at 11-12). When Carter would threaten Kyle, he always brought along some of his friends (Ex. 19 at 14-15).

When Christopher Pullen first met Carter, he tried to sell Pullen drugs (Sept.R.Tr.32). Pullen knew Carter was someone who was always threatening people and he had threatened Pullen (Sept.R.Tr.33-34). Carter had a reputation for getting into fights (Sept.R.Tr.34).

Counsel would have wanted to present evidence that discredited Carter (Sept.R.Tr.134-37,281-84). That evidence would have countered respondent having portrayed Carter as less culpable than Mr. Christeson (Sept.R.Tr.134-37,282-83). Counsel also would have wanted to present evidence about Carter's

prior bad acts, aggressiveness, and violent history (Sept.R.Tr.137). Amber Williams Burgess was listed in counsels' continuance motion as someone, who after Carter's deposition was taken, might possess information to discredit Carter because Carter had identified her as a former girlfriend (T.L.F.445).

As to Amanda Burgess, the motion court found her testimony would not have been persuasive and did not provide a viable defense (R.L.F.930). The motion court found that counsel was not ineffective as to Amber Williams Burgess because her testimony would not have been mitigating and counsel could not have been ineffective because it was the trial court who had denied the continuance motion (R.L.F.928-29). Counsel was not ineffective for failing to call Kyle Burgess because his testimony that Carter only attempted violence when accompanied by others "reinforced" respondent's theory Carter was a follower (R.L.F.929). Counsel was not ineffective for failing to call Christopher Pullen because he testified he never saw Carter get violent with anyone which would have supported respondent's theory Carter was a follower (R.L.F.929-30).

The motion court did not rule on the amended motion claim that it was error for the trial court to have denied counsel's continuance request (R.L.F.179,928-31).

C. Counsel Was Ineffective

All of these findings are clearly erroneous. In *Ervin*, this Court recognized that counsel has a duty to neutralize the aggravating circumstances. Ervin, 80S.W.3d at 827. Moreover, counsel has a duty to investigate and rebut

aggravating evidence. *See Wiggins*,123S.Ct. at 2537. Counsel here failed to neutralize and rebut respondent's aggravating evidence.

Amanda Burgess would have been an especially powerful witness to testify that Carter had a bad reputation for truth and veracity. Her knowledge of that reputation came from her work and training with local police for three years in the Explorer's program where she performed many duties of a police officer.

Likewise, Kyle Burgess knew Carter had a bad reputation for truth and veracity. Additionally, Kyle would have testified about Carter's assaultive, drug dealing, and stealing behaviors. That Carter only engaged in assaultive behavior when he had his friends along (Ex. 19 at 14-15) does not demonstrate Carter was a follower, but instead shows that he felt he could engage in such behavior when he had others along who insured his victims did not get the better of him.

Amber Burgess' testimony that Carter had attempted to sexually assault her while threatening her with a knife and tying her up would have undermined Carter's credibility and the portrayal of him as a mere follower. Further, Amber's account of Carter's physical assaults with her resulting injuries would have demonstrated he was not just a follower. Moreover, Amber's testimony Carter was a controlling person expressly contradicted the follower picture painted. The trial court's denial of a continuance actually proves counsel's ineffectiveness. When the trial court denied the continuance, counsel was on notice that they were going to trial, and therefore, were obligated to complete their investigation into

matters that undermined Carter's veracity. Despite that obligation, counsel did not present available evidence to rebut Carter.

Lastly, Christopher Pullen would have refuted the portrayal of Carter versus Mr. Christeson. Pullen would have presented the true picture of Carter that he sold drugs, threatened people, and had a reputation for fighting. It was not necessary that Pullen actually saw Carter get in fights because he knew Carter had a reputation for fighting.

It was Carter who provided testimony that supported the jury's finding of first degree murder and the aggravating circumstances. If the jury had heard these witnesses testify, then, the jury might have found Mr. Christeson guilty of an offense less than first degree murder or at minimum imposed life. Reasonably competent counsel under similar circumstances would have called these witnesses. Mr. Christeson was prejudiced because there is a reasonable probability the jury would have imposed life.

The same considerations that caused this Court to order new penalty phases in *State v. Phillips*,940S.W.2d512(Mo.banc1997) and *State v. Isa*,850S.W.2d876(Mo.banc1993) also require at least a new penalty phase here. In *Phillips*, this Court found the failure to disclose an audiotape containing evidence that someone other than Phillips was responsible for dismembering the victim's body was prejudicial to the jury finding the aggravator based on dismemberment. *Phillips*,940S.W.2d at 516-17. In *Isa*, the penalty verdict director was improper and prejudicial because it allowed the jury to assess death

against Maria Isa based on her husband's conduct. *Isa*,850S.W.2d at 901-03. Here, the jury was misled to believe that the most blameworthy individual responsible for the most aggravating factors of the offense was Mr. Christeson, while the absent witnesses could have neutralized and rebutted that portrayal. *See Ervin* and *Wiggins*, *supra*.

The amended motion alleged it was error to have denied trial counsels' continuance request, but the motion court did not rule on this claim (R.L.F.179,928-31). In response to respondent endorsing Carter two weeks before trial, counsel sought a continuance (T.L.F.433-34,437-40,443-47;Aug.99Tr.2-22). The continuance was sought to thoroughly investigate Carter's version of what took place and his reputation for veracity (T.L.F.437-40,443-47; Aug.'99Tr.2-22). Throughout the trial counsel renewed their request for a continuance (T.Tr.765-68,949-50,1251,1393,1519). Particularly noteworthy was that before Carter testified counsel renewed their request for a continuance because of the need to investigate Carter (T.Tr.949-50). On appeal, this Court rejected the claim that raised the denial of a continuance on the grounds that there was no showing of what evidence would have developed if a continuance had been granted. *Christeson*,50 S.W.3d at 262. If this Court now finds that counsel was not ineffective, then this Court should find that a continuance should have been granted because the 29.15 record does show what evidence would have developed, if a continuance had been granted. This record now shows either counsel was ineffective or a continuance should have been granted.

This Court should reverse for a new trial or at minimum a new penalty phase because counsel was ineffective or a continuance should have been granted.

II. MICHAEL GIBBS WOULD HAVE REBUTTED AGGRAVATING EVIDENCE

The motion court clearly erred when it denied the claim counsel was ineffective for failing to call Michael Gibbs to testify Mr. Christeson did not make the statement to him "Of course I did but they ain't got shit on me" and that Mr. Christeson told him that he had nothing to do with killing the Brouks to rebut Milner's testimony Mr. Christeson made that statement because Mr. Christeson was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that this evidence would have rebutted this aggravating evidence and reasonably competent counsel under similar circumstances would have called Gibbs. Mr. Christeson was prejudiced because there is a reasonable probability that the jury would have imposed life.

The motion court denied the claim counsel was ineffective for failing to call Michael Gibbs to rebut Milner's testimony that he heard Mr. Christeson say to Gibbs: "Of course I did but they ain't got shit on me." Mr. Christeson was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment when Gibbs was not called. U.S. Const. Amends. VI, VIII, and XIV. There is a reasonable probability that had Gibbs been called that Mr. Christeson would have been sentenced to life.

Review is for clear error. Barry v.State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise

customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

This Court has recognized that "One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*,80 S.W.3d 817,827(Mo.banc2002) (citing *Bell v. Cone*,122S.Ct.1843(2002)). *See*, *also*, *Wiggins v. Smith*,123S.Ct.2527,2537(2003) (counsel has duty to investigate and rebut aggravating evidence); *Parker v. Bowersox*,188F.3d923,929-31(8thCir.1999) (counsel ineffective for failing to present evidence that would have rebutted aggravating circumstance that victim was a potential witness against Parker in two cases).

A. Trial Facts

Leftwich moved to withdraw when respondent endorsed her former client, Michael Gibbs, who had been a Vernon County Jail inmate with Mr. Christeson (T.L.F.404-05;May'99Tr.11-12). Respondent gave notice that it intended to call another Vernon County Jail inmate, Milner, to testify (May'99Tr.11-12). Respondent called a third Vernon County Jail inmate, Wagner, to testify Mr. Christeson sodomized him (T.Tr.1547-48). Milner testified to circumstances in the cell he had shared with Wagner and Mr. Christeson that could have led the jury to believe the sodomy of Wagner occurred (T.Tr.1572-74). Milner also reported having heard Mr. Christeson say to Gibbs '"Of course I did but they ain't got shit on me."' (T.Tr.1575-76).

Leftwich sought to withdraw on the grounds that if the respondent called Gibbs, then, as a former client, she could not cross-examine Gibbs about matters that she had learned about during her former representation of him (May'99Tr.12-13). Further, Leftwich requested to withdraw because if she decided that she wanted to call Gibbs to testify, then he would be subject to attack for bias because Leftwich had formerly represented him (May'99Tr.13-14).

This Court rejected the claim of error in denying Leftwich leave to withdraw. *Christeson*,50 S.W.3d at 260-61. This Court rejected Leftwich's concern about having to cross-examine Gibbs because respondent had agreed not to call Gibbs. *Christeson*,50 S.W.3d at 260-61. Further, this Court rejected Leftwich's concerns about calling Gibbs as a defense witness because it was "pure speculation that Gibbs would have testified favorably for Christeson, and the defense made no offer of proof to that effect." *Christeson*,50 S.W.3d at 261. This Court added that it found Leftwich's concern that respondent could gain some advantage through highlighting Leftwich's former representation "tenuous, at best." *Christeson*,50 S.W.3d at 261.

B. <u>Gibbs' And Counsel's 29.15 Testimony And Findings</u>

Gibbs testified for the 29.15 case. While Gibbs was held in Vernon County, Mr. Christeson never made the statement Milner attributed to him (Ex. 28 at 8). Moreover, Mr. Christeson never confessed to Gibbs having committed any crime (Ex. 28 at 8). Mr. Christeson told Gibbs that he had nothing to do with killing the Brouks (Ex. 28 at 8-9). Before trial, Gibbs told Leftwich that Mr.

Christeson had not confessed to him and that what Milner reported was not true (Ex. 28 at 12-13). Gibbs, however, told Leftwich that he did not wish to testify (Ex. 28 at 13-14). The reason Gibbs did not want to testify was that a woman and children were the victims (Ex. 28 at 14). Gibbs' reluctance to testify had nothing to do with that charges were pending against him or just not wanting to get involved (Ex. 28 at 14).

Gibbs was willing to testify at the 29.15 case because 29.15 counsel furnished Gibbs with information that made Gibbs want to give Mr. Christeson the benefit of the doubt that he may not be guilty of the crimes charged (Ex. 28 at 15). In particular, Gibbs was willing to testify at the 29.15 case because 29.15 counsel had informed Gibbs that a co-defendant was also charged and that Mr. Christeson had never given a confession (Ex. 28 at 16-17).

Leftwich testified that before trial she had met with Gibbs and he was "clear and unequivocal" Mr. Christeson did not make the statement to Gibbs that Milner attributed to him (Sept.R.Tr.270-72). Leftwich did not call Gibbs because even though he could testify Mr. Christeson did not make the statement, it was Gibbs' opinion that Mr. Christeson should get the death penalty and he would testify to his opinion (Sept.R.Tr.271-72). Leftwich knew that a witness could not recommend a punishment in penalty phase (Sept.R.Tr.272). Gibbs was hostile to testifying to what he knew because "he didn't feel it was right to kill women and children." (Sept.R.Tr.272). Gibbs never refused to testify (Sept.R.Tr.396). Leftwich never explained to Gibbs that Carter was a co-defendant and did not

furnish Gibbs any information that Mr. Christeson might not have committed the offenses (Sept.R.Tr.272-73).

The motion court rejected this claim because Gibbs had refused to testify when Leftwich asked, making him "not available," and therefore, counsel could not be ineffective (R.L.F.925). It also found that Gibbs testified at the 29.15 that he was then willing to testify because 29.15 counsel had supplied Gibbs "unspecified information" that led Gibbs to believe Mr. Christeson is actually innocent (R.L.F.925). The motion court also found that based on Gibbs' criminal record his testimony was not believable (R.L.F.925). Also the motion court found Gibbs' testimony not credible because Gibbs "implied" he would have killed Mr. Christeson in jail if he had believed the charges were true, but testified in the 29.15 because he believes Mr. Christeson is innocent (R.L.F.925).

C. <u>Counsel Was Ineffective</u>

The duty to provide effective assistance includes an obligation to investigate evidence available on behalf of the client. *Perkins-Bey v. State*,735 S.W.2d170,171(Mo.App.,E.D.1987). Such investigation would be an "empty duty" if counsel, having obtained the information failed to take the steps necessary to produce it a trial. *Perkins-Bey*,735 S.W.2d at 171 (counsel ineffective for failing to subpoena defendant's alibi witness who had failed to keep appointment interviews). Further, '"[a] competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court in order to

allow the judge to use his power to persuade the witness to present material evidence."' *Perkins-Bey*,735 S.W.2d at 171(Mo.App.,E.D.1987) (quoting *Eldridge v. Atkins*,665F.2d228,235(8thCir.1981)).

In *Eldridge*, the Court noted that "[w]hen a man's liberty is at stake counsel owes a greater duty than to simply accept someone's hearsay statement that the witness would rather not testify." *Eldridge v. Atkins*,665F.2d at 235. There, counsel was ineffective for failing to call alibi witness store clerk Taylor to testify Eldridge was present making a purchase during the time of the offense simply because Taylor did not want to be involved. *Eldridge v. Atkins*,665F.2d at 235.

Counsel was ineffective for the same reasons counsel in *Eldridge* and *Perkins-Bey* were ineffective. Gibbs did not want to be a witness here just as the store clerk did not want to be a witness in *Eldridge*. Counsel owed Mr. Christeson the duty to subpoena Gibbs even though he would rather have not testified. *See Eldridge* and *Perkins-Bey*. Under *Eldridge*, Gibbs was not "unavailable." Moreover, the motion court's finding that Gibbs refused to testify (R.L.F.925) is clearly erroneous because Leftwich testified that Gibbs never refused to testify (Sept.R.Tr.396).

Moreover, counsel failed to use "every voluntary effort to persuade" Gibbs to testify. *Perkins-Bey* and *Eldridge*, *supra*. Gibbs' reasons for not wanting to testify was that he did not believe it was right to kill women and children (Sept.R.Tr.272). No one would disagree with Gibbs' belief. Rule counsel, unlike Leftwich was able to obtain Gibbs' cooperation to testify merely by furnishing

him with the information that a codefendant was also charged and Mr. Christeson had never confessed (Ex. 28 at 16-17). That information changed Gibbs' mind about testifying because he was willing to give Mr. Christeson the benefit of the doubt that he had not committed the offenses (Ex. 28 at 15). Reasonable trial counsel under similar circumstances would have used similar voluntary efforts to persuade Gibbs to testify. *See Eldridge*. Even if Gibbs did not want to voluntarily testify, reasonable counsel would have subpoenaed Gibbs to court to testify. *See Perkins-Bey*, *supra*. Few witnesses want to "volunteer" testimony. Counsel has a duty to subpoena witnesses to court to obtain their testimony.

This Court noted that the statement Milner reported hearing was unclear as to whether it referred to the murders, the sodomy of Wagner, or some other misconduct. Christeson,50S.W.3d251,260(Mo.banc2001). Gibbs'testimony would have refuted all of these possibilities.

The motion court's finding that Gibbs implied that he would kill Mr. Christeson is clearly erroneous because there was no testimony to support this finding (*See* Ex. 28). In any event, Gibbs would not have been permitted to testify that he wanted to kill Mr. Christeson. *See Perkins-Bey, supra*.

It is irrelevant the motion court found Gibbs not credible because the issue is whether the jury might have found him convincing. *Kyles v. Whitley*,514U.S.419,449 n.19(1995). The motion court found Gibbs not credible because of his criminal history. Milner, however, was no more credible than Gibbs because the reason Milner was in a position to be called as a witness was his

purported knowledge of Mr. Christeson's actions was obtained through his criminal history which put him in the Vernon County Jail with Mr. Christeson and Gibbs. The jury should have been afforded the chance to decide whether to believe Gibbs rather than Milner.

In order for trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003). Counsel did not exercise reasonable strategy in failing to subpoena and call Gibbs. Counsel's reason for not calling Gibbs was that Gibbs would offer the opinion Mr. Christeson deserved death (Sept.R.Tr.271-72). Counsel, however, knew that a witness was not allowed to recommend a punishment (Sept.R.Tr.272*).* *See Payne v. Tennessee*,501U.S.808,830 n.2 (1991). Knowing that such a recommendation was not admissible, it was not reasonable strategy to fail to call Gibbs. *See Butler*.

This Court's direct appeal decision findings only reinforce why counsel did not act reasonably when Gibbs was not called. This Court found Leftwich's concerns about Gibbs' credibility being attacked because he was her former client "tenuous, at best." *Christeson*,50 S.W.3d at 261. Moreover, Gibbs' 29.15 testimony establishes that it is no longer speculation that Gibbs could have testified favorably. *Christeson*,50 S.W.3d at 261. The decision to not call Gibbs, while knowing he would have refuted Milner, was not reasonable strategy. *Butler*, *supra*.

Reasonably competent counsel under similar circumstances would have called Gibbs to testify to rebut the aggravating evidence Milner supplied. *See Ervin*. Mr. Christeson was prejudiced because there is a reasonable probability the jury would have imposed life.

This Court should order a new penalty phase.

III. FAILURE TO THOROUGHLY EXAMINE DR. CARTER

The motion court clearly erred in denying the claim that counsel failed to conduct a thorough examination of psychologist Dr. Patricia Carter, who conducted a competency to proceed evaluation of co-defendant Carter, failing to elicit that Carter reported that he has out-of-body experiences and believes he can travel like a spirit because Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances who called Dr. Carter as their witness would have elicited this information and Mr. Christeson was prejudiced because this information called into substantial question Carter's veracity about what he recounted happened such that Mr. Christeson would not have been convicted of first degree murder or at minimum would have been sentenced to life.

In guilt phase, defense counsel called psychologist Dr. Patricia Carter to testify about the competency to proceed evaluation she conducted of co-defendant Carter. Counsel did not elicit from Dr. Carter that Carter reported that he has out-of-body experiences and believes he can travel like a spirit. Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, and to effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV. Reasonably competent counsel under similar circumstances would have elicited this information from Dr. Carter and Mr. Christeson was prejudiced because this

information would have called into substantial doubt Carter's veracity as to what he reported had happened such that Mr. Christeson would not have been convicted of first degree murder or at minimum would have been sentenced to life.

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

At trial, counsel called Dr. Patricia Carter. She had conducted a competency to proceed evaluation of Carter (T.L.F.461-74). Counsel had filed a motion requesting a hearing on Carter's competency to testify (T.L.F.455-57). Dr. Carter's report was an exhibit to counsel's motion (T.L.F.456-57,461-74). The motion urged that a hearing on Carter's competency to testify was required because when Dr. Carter asked co-defendant Carter whether he had any special powers "he told her that his spirit could leave his body and that he uses this power to check on his family while he is in jail." (T.L.F.456). This information appeared in Dr. Carter's report (T.L.F.470).

Counsel's direct examination of Dr. Carter focused on presenting evidence of Carter's denials to her of having had any involvement (T.Tr.1343-53). On cross-examination, respondent elicited that Dr. Carter had found Carter did not suffer from any mental disease that rendered him incompetent to proceed in his case (T.Tr.1354). On redirect, counsel only elicited that Carter reported hearing voices (T.Tr.1354-55). Counsel did not elicit that Carter had reported having out-

of-body experiences and believes he can travel like a spirit (T.Tr.1343-56). Respondent's case against Mr. Christeson was premised on Carter's testimony. *See* Point I.

Counsel McBride did not know why he failed to elicit from Dr. Carter what Carter had reported about his out-of-body experiences and traveling like a spirit (Sept.R.Tr.137-39). The motion court rejected this claim on the grounds that this evidence would have "reinforced" respondent's theory that Carter was a '"follower"' (R.L.F.931).

Mental derangement may be used to impeach a witness if the derangement occurred near the time of the incident testified to, or after the incident, because it could impair the witness' ability to accurately observe events or remember them. *State v. Pinkus*,550S.W.2d829,839-40(Mo.App.,Spfld.D.1977). In *Hadley v. Groose*,97F.3d1131,1133,1135-36(8thCir.1996) counsel was ineffective for failing to discredit a police officer's testimony about the circumstances of an offense when the officer was not questioned about what was reported about those circumstances in another officer's police report.

Here, counsel had the information about Carter's reporting of bizarre beliefs to Dr. Carter because they referenced them in their motion for an evaluation of Carter and had obtained this information from Dr. Carter's report. Reasonably competent counsel under similar circumstances who had this information and had relied on it in their motion for a competency evaluation of Carter would have elicited it from Dr. Carter. *See Hadley*. Mr. Christeson was

prejudiced because this information called into substantial question Carter's veracity about what he recounted happened such that Mr. Christeson would not have been convicted of first degree murder or at minimum would have been sentenced to life. Showing that Carter could not be believed because of his bizarre thinking would not have somehow aided respondent's theory that Carter was a follower.

This Court should order a new trial or at minimum a new penalty phase.

IV. COUNSELS' FAILURES TO OBJECT

The motion court clearly erred when it denied the claims that counsel was ineffective for failing to properly object to and preserve the following:

A. The prosecutor's repeated questioning, related commentaries, and vouching during witness testimony that while Carter's prior statements were untruthful his trial testimony was truthful;

B. The prosecutor's repeated commentaries during Mr. Christeson's testimony that his testimony was untruthful;

C. Dr. Bland's testimony that Carter was competent to proceed to trial; and

D. The prosecutor's death qualification voir dire comments that at the end of the punishment making decision process the respondent was relieved of its proof beyond a reasonable doubt burden

because Mr. Christeson was denied effective assistance, due process, freedom from cruel and unusual punishment, and his right to remain silent and not incriminate himself, U.S. Const. Amends. V, VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances would have objected and Mr. Christeson was prejudiced as he would not have been convicted of first degree murder or at minimum sentenced to life.

Trial counsel failed to properly preserve and object to the prosecutor's repeated questioning and commentaries on the truthfulness of witnesses, evidence that Carter was competent to proceed, and statements the prosecutor made

lessening respondent's burden of proof on punishment. Mr. Christeson was denied effective assistance, due process, freedom from cruel and unusual punishment and his right to remain silent and not incriminate himself. U.S. Const. Amends. V, VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

A. Commentaries on Carter's Truthfulness

Respondent's questioning of Carter included eliciting that he first denied any involvement to the police (T.Tr.1064 L.6-10;App.A1). This was followed by the prosecutor stating that the officers told Carter that they did not believe him and Carter acknowledging that occurred (T.Tr.1064 L.11-14;App.A1). The prosecutor next elicited that Carter then told the police what he knew about the homicides (T.Tr.1064 L.15-17;App.A1). This was followed by the prosecutor asking: "And was that the truth when you told it to them?" and Carter responding affirmatively (T.Tr.1064 L.18-19;App.A1). Only after this occurred did counsel then object (T.Tr.1064 L.20-22;App.A1). Counsel did not know why he did not timely object to these matters (Sept.R.Tr.161-62). The motion court ruled counsel acted reasonably, the prosecutor's questioning was proper redirect after efforts to impeach Carter on cross-examination, counsel did object, the objection was

overruled, and there was no reason to believe any other action would have succeeded (R.L.F.818-19).

The prosecutor asked Carter whether he had been evaluated for trial by three doctors, including Dr. Carter, and Carter responded "Yes" (T.Tr.1065 L.7-11;App.A2). This was followed by the prosecutor asking Carter "And you didn't tell them what really happened, did you?" and Carter responded "No" (T.Tr.1065 L.12-14;App.A2). Only then did counsel object on the grounds that Carter had said he did not remember and that objection was overruled (T.Tr.1065 L.15-20;App.A2). Counsel acknowledged his objection was a narrow one and did not offer any reason why he did not object on improper bolstering and vouching grounds (R.Tr.163-64). The motion court found that counsel did object, there was no reason to believe that an objection on other grounds would have succeeded, and the questioning was proper rehabilitation of Carter after cross-examination (R.L.F.820-21).

Officer Roark interrogated Carter in California (T.Tr.1288-89). Respondent elicited from Roark that Carter initially denied any involvement (T.Tr.1289 L.11-13;App.A3). As a follow-up, the prosecutor asked Roark: "When you spoke with him, sir, did you indicate you did not believe him when he initially denied involvement?" and Roark responded: "Yes" (T.Tr.1289 L.18-21;App.A3). Counsel did not know why he did not object (Sept.R.Tr.176). The motion court found that based on the evidence of guilt, objecting would not have

changed the result and Roark's testimony was proper to explain later investigation so that an objection would not have succeeded (R.L.F.830-31).

A witness is not allowed to comment on the truthfulness of another witness. *State v. Link*,25S.W.3d136,143(Mo.banc2000). All of the above occurrences involved the prosecutor bolstering and vouching for the truthfulness of Carter's in-court story, when compared to his prior denials of involvement, through the prosecutor's personal commentaries or relying on police assessments of Carter's truthfulness as to his earlier denials. If a witness is not allowed to comment on the truthfulness of another witness, then a prosecutor should not be allowed to present matters that merely bolster and vouch for the present truthfulness of a State's witness. *See Link*. This tactic was especially prejudicial to Mr. Christeson because during respondent's initial guilt argument, the prosecutor urged the jury it should believe Carter's in-court story and did so by referencing the police statements that they had not believed Carter's initial denials of involvement (T.Tr.1469-70;App.A4).

Reasonably competent counsel under similar circumstances would have objected to these occurrences. Mr. Christeson was prejudiced because there is a reasonable probability the jury would not have convicted him of first degree murder.

B. Commentaries On Mr. Christeson's Truthfulness

On cross-examination of Mr. Christeson, the prosecutor engaged in repeated commentaries on the truthfulness of his testimony.

1. Claim B 34

In response to one of Mr. Christeson's answers, the prosecutor commented "Really." (T.Tr.1414 L.19-20;App.A5). Counsel objected stating "Now, is that a question?" and the prosecutor responded: "Yes." (T.Tr.1414 L.21-23;App.A5). The prosecutor then followed up with: "And that's what you want this jury to believe?" (T.Tr.1414 L.24-26;App.A5).

The prosecutor's questioning also included: "So you want this jury to believe that [David Bolin] was still there when you returned? He had not yet left for work?" (T.Tr. 1418 L.5-7;App.A6). Counsel only objected to the "form of the question" as to what the jury was to believe (T.Tr.1418 L.8-11;App.A6).

The prosecutor also asked Mr. Christeson where in Susan's trailer he had had a consensual sexual encounter with her and Mr. Christeson indicated that it had occurred in the back bedroom (T.Tr.1420 L.9-10;App.A6). That was followed by: "Okay. And you want us to believe --" (T.Tr.1420 L.11;App.A6). Defense counsel again objected to the form of the question and the trial court overruled that objection (T.Tr.1420 L.12-19;App.A6).

The prosecutor questioned Mr. Christeson about where the Brouks' television was located in their trailer and if it had been in the Brouks' Bronco (T.Tr.1423 L.8-23;App.A7). That was followed by "So as I understand your testimony, sir, what you want us to believe -- . . . ." (T.Tr.1423 L.24-25;App.A7).

Counsel had no reason for failing to object to these commentaries on the grounds they implied knowledge of Mr. Christeson's guilt and improper expressions of opinion by the prosecutor (Sept.R.Tr.360-63). The motion court found counsel acted reasonably because she made numerous objections, the prosecutor's questioning was proper cross-examination, and other objections would not have been sustained (R.L.F.835-36).

Reasonably competent counsel under similar circumstances would have objected to the prosecutor's improper commentaries on Mr. Christeson's truthfulness. *See Link, supra*. Mr. Christeson was prejudiced because there is a reasonable probability that the combination of the prosecutor's improper commentaries vouching for Carter's truthfulness and his improper commentaries attacking Mr. Christeson's truthfulness caused Mr. Christeson to be convicted of first degree murder.

2. <u>Claims B 36 and 37</u>

The prosecutor said to Mr. Christeson: "Isn't it true that the first time that you decided that you had sex with Susan Brouk was after you heard about the DNA results?" (T.Tr.1424 L.2-4;App.A7). Mr. Christeson responded: "No, sir." (T.Tr.1424 L.5;App.A7). The court reporter noted that the prosecutor spoke to his co-counsel (T.Tr.1424 L.6;App.A.7). The prosecutor then stated that he had no further questions (T.Tr.1424 L7-8;App.A.7). Defense counsel then objected without stating a reason (T.Tr.1424 L.9-10;App.A.7). The prosecutor countered that the matter was asked and answered (T.Tr.1424 L.11-12;App.A.7). Counsel

then stated that she was objecting to the prosecutor's "comment that he made after the answer to the question." (T.Tr.1424 L.13-15;App.A7). The prosecutor responded that he had made his comments to co-counsel and he believed that the jurors and the court did not hear them (T.Tr.1424 L.16-19;App.A.7). The court stated it did not hear the remark, but counsel at the table did (T.Tr.1424 L.20-23;App.A.7). Trial counsel did not make a record as to exactly what the prosecutor had said (T.Tr.1424 L.24-25;App.A.7). Mr. Christeson was directed to step down from the witness stand (T.Tr.1424 L.25;App.A.7). The defense then rested their case (T.Tr.1425 L.1-2;App.A.8).

At the 29.15, counsel testified that she did not object to the prosecutor's DNA results question because Mr. Christeson had responded "No" (Sept.R.Tr.363-64). The motion court found counsel exercised reasonable strategy and that Mr. Christeson was not prejudiced because he responded "No" (Sept.R.Tr.837-38).

Counsel testified that she had no reason for failing to make a complete record as to the content of the prosecutor's improper comment at the end of Mr. Christeson's testimony and that she could not then remember what the prosecutor had said (Sept.R.Tr.364). Counsel indicated that she did remember, because they had argued shortly after Mr. Christeson testified, that the prosecutor had made comments related to Mr. Christeson's testimony to her in the hallway, accusing her of knowingly putting on perjured testimony (Sept.R.Tr.364-65). The motion court found that it was not proven that any comment was made, the trial court and

the court reporter did not hear the comment, the jurors "most likely did not hear any such comments," and there was no reasonable probability of a different result based on the evidence against Mr. Christeson (R.L.F.838-39).

Reasonably competent counsel under similar circumstances would have objected to the prosecutor's improper commentaries on Mr. Christeson's truthfulness. *See Link, supra*. Further, that counsel would have objected to the DNA commentary because it constituted a comment on Mr. Christeson having exercised his right to silence and to not incriminate himself. *See State v. Dexter*,954S.W.2d332,334,339(Mo.banc1997) (questioning referencing exercise of *Miranda* rights required reversal based on *Doyle v. Ohio*,426U.S.610(1976)). Additionally, reasonably competent counsel under similar circumstances would have made a complete record as to the prosecutor's comments that were made at the end of Mr. Christeson's testimony, which he admitted having made to his co-counsel (T.Tr.1424 L.16-19;App.A.7), because they constituted his opinions on Mr. Christeson's truthfulness. Mr. Christeson was prejudiced because there is a reasonable probability that absent these commentaries on truthfulness and all of the other commentaries on Mr. Christeson's and Carter's truthfulness that Mr. Christeson would not have been convicted of first degree murder.

C. Dr. Bland Found Carter Competent

On cross-examination in guilt, respondent elicited from Dr. Bland, without any objection, that he had found Carter competent to assist in his defense (T.Tr.1367-68;App.A.9). Counsel did not object because he had not considered

the difference between competency to proceed versus competency to testify (Sept.R.Tr.180-81). The motion court found the jury had heard the testimony about Carter's mental impairments, respondent's questioning was proper to negate this evidence about Carter, an objection to this questioning would not have been sustained, and no prejudice occurred because of the evidence against Mr. Christeson (R.L.F.834-35).

The standard for judging a defendant's competency to proceed is whether he has the capacity to understand the proceedings against him and to assist in his defense. *State v. Messenheimer*,817S.W.2d273,278(Mo.App.,S.D.,1991). *See also*, §552.020.1. In contrast, the standard for judging witness competency is whether the witness has the capacity to observe the occurrence about which he testified, to remember it, to translate it into words, and to understand the obligation to speak the truth. *State v. Newton*,963S.W.2d295,297(Mo.App.,E.D.1998).

Reasonably competent counsel under similar circumstances would have objected to this testimony because of the difference between competency to proceed and to testify. *Newton, supra*. Further, that counsel would have objected because the jurors would have interpreted the finding of Carter's competency to proceed as an endorsement of the truthfulness of Carter's testimony in Mr. Christeson's case. Lastly, reasonably competent counsel would have objected because Carter's competency to proceed on the charges against him was not relevant to any issues the jury was required to determine. Mr. Christeson was prejudiced because there is a reasonable probability that he would not have been

convicted of first degree murder without this testimony which portrayed Carter as a competent witness.

D. Punishment Burden Of Proof Lessened

On repeated occasions during death qualification, the prosecutor told the venirepanels that at the end of the punishment making decision process the respondent was relieved of its proof beyond a reasonable doubt burden (T.Tr.69-70,163-65,261-62,368-70;App.A10-15). Ten jurors who actually served on Mr. Christeson's jury heard these statements. They were Ashby, Bruce, Conner, Smith, Chaput, Allen, Caldwell, Daniels, Harris, and Jeffries (T.L.F.495;T.Tr.31,224-25,338-39). Counsel had no reason for failing to object to these statements (Sept.R.Tr.302-03). The motion court found counsel did not act unreasonably in failing to object, the prosecutor was explaining how aggravating and mitigating circumstances are to be weighed, and there was no reasonable probability of a different result (R.L.F.788-89).

The State always has the burden of satisfying the beyond a reasonable doubt standard. *See In re Winship*,397U.S.358,364(1970). Reasonably competent counsel under similar circumstances would have objected to these statements that respondent did not have to satisfy the beyond a reasonable doubt standard. Mr. Christeson was prejudiced because there is a reasonable probability he would not have been sentenced to death if the jurors had not heard these statements.

For all the reasons discussed, this Court should order a new trial or at minimum a new penalty phase.

V. APPELLATE COUNSEL'S INEFFECTIVENESS

The motion court clearly erred denying the claims direct appeal counsel was ineffective for failing to raise the trial court erred in: (a) sustaining respondent's objection to counsel's guilt phase closing argument that Dr. Dix's autopsy findings established Carter should not be believed; (b) overruling counsel's objection to Carter testifying to an alleged statement Susan Brouk directed at Mr. Christeson; (c) sustaining respondent's objections to counsel's guilt opening statement that respondent had recovered fingerprints that did not belong to Mr. Christeson or Carter and Carter recently changed his version of what happened because he had received a deal; and (d) finding Carter was competent to testify, because Mr. Christeson was denied his rights to effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent appellate counsel would have raised these claims and there is a reasonable probability Mr. Christeson's conviction would have been reversed.

Direct appeal counsel failed to present several meritorious issues that required Mr. Christeson's conviction be reversed. Mr. Christeson was denied his rights to effective counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant

must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

A defendant is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*,469U.S.387,396-97(1985). To be entitled to relief on a claim of appellate ineffectiveness the error not raised must have been so substantial as to rise to the level of a manifest injustice or a miscarriage of justice. *Moss v. State*,10S.W.3d508,514-15(Mo.banc2000).

A. <u>Argument Dr. Dix's Findings Establish Carter Should Not Be Believed</u>

During guilt closing argument, defense counsel attempted to argue how pathologist Dr. Dix's objective autopsy findings as to the injuries Adrian and Kyle sustained were inconsistent with what Carter reported was done to them (T.Tr.1477-78;App.A16). The trial court sustained respondent's objection that it was improper to argue an adverse inference (T.Tr.1478;App.A16).

Appellate counsel conceded that she should have raised on direct appeal the trial court sustaining respondent's objection and it was not her strategy to have omitted this as a claim (R.L.F.505). The motion court found that the prosecutor's objection was properly sustained and that appellate counsel's testimony that she should have raised this claim was not credible (R.L.F.900-01).

In *State v. Barton*,936S.W.2d781,783(Mo.banc1996), this Court noted that "[t]he right to a fair trial demands a reasonable opportunity to present the defendant's theory of the case during closing argument." This Court added that

"[c]losing arguments are particularly important in capital cases where there are unique threats to life and liberty." *Barton*,936S.W.2d at 783. Defense counsel has the right to make any argument that is essential to the defense and is justified by the evidence and it is an abuse of discretion to prohibit any such argument. *Barton*,936S.W.2d at 784. Even though the State produced "ample evidence" to convict Barton, this Court reversed because the trial court sustained respondent's objection to defense counsel's proper argument and Barton was prejudiced. *Barton*,936S.W.2d at 784-87.

Counsel's proper argument here sought to show why Carter should not be believed because his testimony was contrary to Dr. Dix's objective autopsy findings, yet the trial court sustained respondent's objection. Respondent's case was premised on Carter's testimony. *See* Point I. Because respondent's case was premised on Carter's testimony, counsel's argument attacking his credibility was essential to the defense and prohibiting counsel's argument was prejudicial. *See Barton*.

Reasonably competent appellate counsel under similar circumstances would have raised this claim on appeal. Mr. Christeson was prejudiced as there is a reasonable probability the jury would not have convicted him of first degree murder, if counsel had been allowed to make this argument, and therefore, the claim would have succeeded on appeal.

B. Carter's Testimony About What Susan Brouk Said

Respondent elicited from Carter that Susan appeared angry when she and Mr. Christeson came back out of the bedroom (T.Tr.978-79;App.A17). Next, respondent asked Carter what basis he had for that testimony and whether Susan said anything to Mr. Christeson (T.Tr.978-79;App.A17). Carter was allowed to testify, over counsel's hearsay objection, that Susan said to Mr. Christeson: '"You had your fun, now get out.'" (T.Tr.979;App.A17). Respondent's guilt rebuttal argument repeatedly emphasized that Susan was raped (*See* T.Tr. 1495,1497,1501-03,1505;App.A18-21). In respondent's initial penalty argument it emphasized again that Susan was raped and that the rape was an aggravator (T.Tr.1707-09,1711;App.A22-23). The jury found as an aggravator that Susan was raped (T.L.F.557).

Appellate counsel acknowledged that she should have challenged the trial court's ruling based on this Court's decision in *State v. Bell*, 950S.W.2d482(Mo.banc1997) and this omission was not a matter of her strategy (R.L.F.508-09). The motion court ruled this evidence was properly admissible as part of the res gestae of the crime, and therefore, appellate counsel was not ineffective for failing to raise this matter (R.L.F.903).

In *Bell*, this Court reversed Bell's homicide conviction when respondent introduced hearsay evidence to challenge his version of how his wife was set on fire. *Bell*,950S.W.2d at 482-83. The hearsay evidence involved respondent

having called witnesses to testify about how the victim had reported to them Bell's history of physically abusing her. *Bell*,950S.W.2d at 482-83.

Here, Carter's rendition of what Susan said was prejudicial hearsay. It was not part of the res gestae of the homicide. Reasonably competent appellate counsel under similar circumstances would have raised this claim. Mr. Christeson was prejudiced because the jury heard hearsay testimony of Susan Brouk that she was in fact raped and there is a reasonable probability that without this testimony Mr. Christeson would not have been convicted of first degree murder.

C. Counsel's Opening Statement Was Improperly Limited

During guilt opening statement, the trial court sustained respondent's objection to counsel reciting that the jury would hear evidence that a fingerprint examiner found fingerprints in the Brouks' home that did not belong to Mr. Christeson or Carter (T.Tr.791-92;App.A24). Respondent objected that counsel was seeking to put before the jury an improper negative inference (T.Tr.791-92;App.A24).

The trial court also sustained respondent's argumentative objection to counsel's guilt opening statement that the jury would hear evidence Carter had changed having denied committing the offenses to the police and doctors who evaluated him to then admitting involvement because he had gotten a deal to testify against Mr. Christeson (T.Tr.787-90;App.A25).

Appellate counsel testified that she should have challenged these rulings (R.L.F.502-04). On both matters, the motion court ruled that the respondent's

objections were properly sustained and that appellate counsel's testimony was not credible (R.L.F.899-900).

In *State v. Thompson*,68S.W.3d393(Mo.banc2002), this Court reversed the defendant's murder conviction because the trial court limited counsel's opening statement. This Court noted that "[t]he primary purpose of an opening statement is to inform the judge and jury of the general nature of the case, so they may appreciate the significance of the evidence as it is presented." *Thompson*,68S.W.3d at 394. Thompson was prejudiced because counsel was not allowed to outline the theory of her case. *Thompson*,68S.W.3d at 395. In *Thompson*, counsel was not allowed to tell the jury that on cross-examination she would elicit multiple matters, including that fingerprints found near the crime scene did not match the defendant. *Thompson*,68S.W.3d at 395.

Like *Thompson*, Mr. Christeson's counsel was prohibited in opening statement from telling the jury multiple matters, including that fingerprints found near the crime scene did not match the defendant. Counsel's theory of the case was to discredit Carter's testimony on cross-examination that he was testifying differently from what he told the police and doctors who evaluated him, having previously denied any involvement, because he had gotten a deal to waive the death penalty (T.Tr.1018-63). Under *Thompson*, counsel was entitled to present in opening statement the theory that Carter's change from representing he had no involvement to admitting he and Mr. Christeson were involved was because he had received a deal to waive death.

Reasonably competent appellate counsel under similar circumstances would have raised these matters. Mr. Christeson was prejudiced because there is a reasonable probability that had the jury heard these matters in opening statement that Mr. Christeson would not have been convicted of first degree murder, and therefore, on appeal this issue would have succeeded.

D. Carter's Competency To Testify

The trial court found that Carter was competent to testify, even though he experiences auditory and visual hallucinations (T.Tr.1-8,1058-60; Ex. 59 at 204-07). The trial court based its ruling on evaluations that found Carter possessed the capacity to understand the proceedings against him and to assist in his defense (T.Tr.6-7). Those evaluations also noted that Carter has borderline intellectual functioning (T.Tr.7).

Appellate counsel agreed that the trial court applied the wrong legal standard for determining whether Carter was competent to testify (R.L.F.467-68). She did not know why she did not challenge on appeal the trial court's finding Carter was competent to testify (R.L.F.469). The motion court ruled that Carter was not shown to be incompetent and that his mental problems went to the weight and not the admissibility of his testimony, and therefore, appellate counsel was not ineffective for failing to challenge the trial court finding Carter was competent to testify (R.L.F.821-22).

The standard for judging a defendant's competency to proceed is whether he has the capacity to understand the proceedings against him and to assist in his

defense. *State v. Messenheimer*,817S.W.2d273,278(Mo.App.,S.D.,1991). *See also*, §552.020.1. The standard for judging witness competency, however, is whether the witness has the capacity to observe the occurrence about which he testified, to remember it, to translate it into words, and to understand the obligation to speak the truth. *State v. Newton*,963S.W.2d295,297(Mo.App.,E.D.1998). Carter was incompetent to testify because his auditory and visual hallucinations, coupled with his borderline intellectual functioning, rendered him incompetent to testify under these *Newton* standards.

Reasonably competent appellate counsel under similar circumstances would have challenged on appeal the trial court finding Carter was competent to testify and its application of the wrong legal standard because Carter was not a competent witness based on his auditory and visual hallucinations and his borderline intellectual functioning. Mr. Christeson was prejudiced because there is a reasonable probability he would not have been convicted of first degree murder without Carter's testimony and this issue had a reasonable probability of succeeding on appeal. The prejudice to Mr. Christeson is demonstrated further through respondent having elicited from Dr. Bland on guilt cross-examination that he had found Carter competent to stand trial (T.Tr.1367-68). *See* Point IV.

For all the reasons discussed, this Court should order a new trial.

VI. MITIGATING EVIDENCE NOT PRESENTED

The motion court clearly erred when it denied the claims counsel was ineffective for failing to call Terry, Carmen, David, Joseph, Kevin, and Laura Bolin and Anna, Dale, and Jerry Christeson, and Kathleen Craig, Chester Bockover, Debbie Bullock, and Melissa Keeney to testify about Mr. Christeson's positive character traits which included that he was hardworking, trustful, truthful, not aggressive or violent, and got along well with and was helpful to others, and failed to present evidence of sexual and verbal abuse he suffered, because Mr. Christeson was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances would have called these witnesses and Mr. Christeson was prejudiced because there is a reasonable probability that the jury would have imposed life.

The motion court denied the claim counsel was ineffective for failing to call multiple mitigation witnesses who would have testified about Mr. Christeson's positive personal character traits and sexual and verbal abuse suffered. Counsel should have called these witnesses and Mr. Christeson was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV. If counsel had called these witnesses there is a reasonable probability the jury would have imposed life.

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). In *Terry Williams v. Taylor*,529U.S.362,369,395(2000), trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist, but failed to conduct investigation that would have uncovered extensive evidence of his abusive and deprived childhood. The jury also did not hear that Williams was borderline mentally retarded and his mental impairments were likely organic in origin. *Id.*370,395-98. The Court concluded Williams was denied effective assistance under *Strickland*. *Id*.396-98. Similarly, in *Wiggins v. Smith*,123S.Ct.2527,2537,2542(2003), the Court found that counsel's failure to conduct a thorough investigation that would have uncovered evidence of physical and sexual abuse reflected only a partial mitigation case was actually presented to the jury. That partial case was the result of inattention and not reasoned strategic judgment and constituted ineffective assistance of counsel. *Wiggins*,123S.Ct. at 2537,2542.

A. <u>The Penalty Phase That Was Presented</u>

The defense penalty phase focused on presenting evidence of neglect Mr. Christeson suffered. Absent from the mitigation case was a wealth of information about Mr. Christeson's positive personal attributes. Also, missing from the penalty phase was evidence of sexual and verbal abuse Mr. Christeson suffered. This information would have complimented the neglect evidence and would have caused the jury to vote for life.

Leftwich testified her mitigation theory was to focus on the dysfunctional circumstances in which Mr. Christeson was raised and the impact of William Christeson's death on him (Sept.R.Tr.252,315). Mr. Christeson's family was cooperative in providing information (Sept.R.Tr.274-75). Leftwich did not present evidence that was obtained from them because she did not find any dysfunctional family information (Sept.R.Tr.274-75). Leftwich never considered having Mr. Christeson's family testify about his positive personal attributes (Sept.R.Tr.274-75).

In penalty, Mr. Christeson's mother, Linda Christeson, testified (T.Tr.1600-22). She recounted that she emotionally distanced herself from Mr. Christeson because he was born out of an extra-marital relationship with her brother-in-law, Johnny Christeson (T.Tr.1607-09). Her husband, William Christeson, had heart problems and been hospitalized at a state mental hospital (T.Tr.1608). She recounted her own history of manic depressive illness and hospitalization (T.Tr.1611-12). Linda described Mr. Christeson's distraught response when she told him that William was not his father (T.Tr.1615). She always put her other son

Billy ahead of Mark because of her guilt surrounding Mark's parentage (T.Tr.1616). Linda described having turned over Mr. Christeson's care to David Bolin and avoiding contact with him (T.Tr.1616-20).

Billy Christeson recounted that William had been their primary caregiver until he died (T.Tr.1623-24). He described Mark's emotional pain when William died (T.Tr.1625-28). When William died, Billy and Mark had to care for themselves because their mother cared more about her boyfriends (T.Tr.1632). Billy described how Linda had favored him and distanced herself from Mark (T.Tr.1633-335).

Edna Belcher, Mr. Christeson's aunt, recounted Mr. Christeson's family having lived in a trailer on her property (T.Tr.1640-41). She also described Linda's unfitness as a mother and the circumstances surrounding William's death and Mr. Christeson's reaction (T.Tr.1641-44).

Mr. Christeson's former girlfriend, Laura Shaw, testified about his unhappiness living on Bolin Hill, but then countered that with she wanted nothing further to do with him because of the Brouk homicides (T.Tr.1648).

Child development psychologist, Dr. Draper, testified. She described an incident in which Linda locked Mr. Christeson out in the snow when he was young and the effects of such actions (T.Tr.1669). Also, she reported about beatings Linda inflicted on Mr. Christeson (T.Tr.1669-70). Dr. Draper also recounted Mr. Christeson's feelings of rejection resulting from Linda's treatment of him (T.Tr.1674). She also recounted the problems created by the multiple

family moves Mr. Christeson experienced (T.Tr.1669-72). She also explained that William's death was especially traumatic because Mr. Christeson did not have the benefit of having another stable parent (T.Tr.1670-71,1674).

B. Good Character and Abuse Evidence the Jury Never Heard

For the 29.15, David Bolin described how Mr. Christeson became like a brother to his three daughters (Ex. 10 at 9, 21). David never saw Mr. Christeson become violent (Ex. 10 at 13). Mr. Christeson helped do assorted maintenance work on the buildings at Bolin Hill (Ex. 10 at 16-18). When David's father became wheel-chair bound, Mr. Christeson, helped David care for him (Ex. 10 at 19-21). Mr. Christeson would do co-defendant Carter's chores when he did not do them (Ex. 10 at 28). David trusted Mr. Christeson with his credit card to buy needed supplies (Ex. 10 at 29). The trial defense team did not seek from David the type of information that he furnished to 29.15 counsel and he would have supplied them the same information, if he had been asked (Ex. 10 at 29-30). Counsel did not call David Bolin because the information he could have supplied did not fall within her mitigation theory (Sept.R.Tr. 253). Counsel was sure that David had provided information about Mr. Christeson's positive personal qualities (Sept.R.Tr.275).

Laura Bolin, one of David Bolin's daughters, frequently tried to get Mr. Christeson in trouble, when he first started living with the family (Ex. 13 at 7). Mr. Christeson never tried to get even and did not get angry (Ex.13 at 8). Over time, Laura and her two sisters developed a close relationship with Mr. Christeson

(Ex. 13 at 9-10). Laura was not called because she did not fit within the mitigation theory pursued (Sept.R.Tr.256).

Anna Christeson saw Mr. Christeson with younger children and he tried to protect them (Ex. 20 at 10-11). He was respectful (Ex. 20 at 12). Dale Christeson, Anna's husband (Ex. 20 at 7), never saw Mr. Christeson be angry or aggressive (Ex. 21 at 8). Jerry Christeson, Anna's and Dale's son (Ex. 22 at 6), described how Mr. Christeson was like a brother to him and never saw him act violently (Ex. 22 at 9,11). When other children picked on Jerry at school, Mr. Christeson told them to stop and he did not hit them (Ex. 22 at 10-11). Leftwich did not know why Anna Christeson was not called, even though a paralegal contacted her (Sept.R.Tr.258). Dale Christeson was not called because he did not fit within the mitigation theory presented (Sept.R.Tr.258). There was no reason for not calling Jerry Christeson (Sept.R.Tr.258-59).

Mr. Christeson worked for a cousin, Joseph Bolin, in his pallet hauling and repair business (Ex. 11 at 6-9). Mr. Christeson was an excellent worker and maintained a good personality, even when he worked long hours (Ex. 11 at 11,18-19). Joseph typically handled large amounts of cash and Mr. Christeson never stole any of that money (Ex. 11 at 15-17). Mr. Christeson was patient and never aggressive or violent (Ex. 11 at 19). Leftwich did not know why Joseph Bolin was not called (Sept.R.Tr.255-56).

Debbie Bullock attended school with Mr. Christeson (Ex. 16 at 6-7). He was never violent, always respectful, and not someone who was a bully (Ex. 16 at

7). He had a good reputation for truthfulness (Ex. 16 at 7). Mr. Christeson helped Debbie and others with their homework (Ex. 16 at 7). She trusted Mr. Christeson with the care of her son who he played with and took to movies (Ex. 16 at 8-9). Counsel did not contact Debbie Bullock (Sept.R.Tr.257-58).

Mr. Christeson was like a big brother to his cousin Kevin Bolin, helping him with homework (Ex. 12 at 7-8). Kevin recounted that Mr. Christeson was nice to everyone and would help people, if they needed help (Ex. 12 at 9). He never saw Mr. Christeson angry or display a bad temper (Ex. 12 at 9). Counsel did not speak with Kevin Bolin (Sept.R.Tr.256).

Mr. Christeson helped his cousin Carmen Bolin with homework (Ex. 8 at 7-10). Carmen never saw him lose his temper and he was always nice (Ex. 8 at 9). Leftwich remembered seeing Carmen Bolin, but did not speak with her (Sept.R.Tr.255).

Chester Bockover and Mr. Christeson were friends from school (Ex. 7 at 8). Mr. Christeson was always nice and never mean (Ex. 7 at 9). Bockover never saw Mr. Christeson behave violently, aggressively, or lose his temper (Ex. 7 at 9). Leftwich had no recall of the name Chester Bockover (Sept.R.Tr.254-55).

Melissa Kenney was one of Mr. Christeson's teachers in the St. James Schools (Ex. 26 at 6-8). Mr. Christeson did not cause any trouble in her classes and worked diligently on his assignments (Ex. 26 at 7-10). The defense team had contacted Kenney prior to trial, but she was not called (Ex. 56). Leftwich did not know why Melissa Kenney was not called (Sept.R.Tr.261).

Terry Bolin is David Bolin's brother (Ex 5 at 6). Mr. Christeson helped Terry Bolin to replace his car's transmission (Ex. 5 at 7). He had never seen Mr. Christeson be violent or aggressive (Ex. 5 at 13). Leftwich did not know why Terry Bolin was not called (Sept.R.Tr.253-54).

Kathleen Craig is David Bolin's sister (Ex. 6 at 6). She remembered walking into a room when Mr. Christeson was a baby and saw his mother had her mouth on his penis (Ex. 6 at10-11). She remembered this occurrence because it was "pretty disgusting" (Ex. 6 at 11). Besides the sexual abuse, Craig witnessed verbal abuse when Linda called Mr. Christeson such names as "little bastard" and "little SOB" (Ex. 6 at 11). When Mr. Christeson's family lived on the Belcher's property, Jerry Belcher called Mr. Christeson a "little bastard" and a "little son of a bitch" and threatened to "kick his ass" (Ex. 6 at 13). Craig never saw Mr. Christeson lose his temper or be violent (Ex. 6 at 16-18). When Mr. Christeson lived with David Bolin, he acted like a brother towards David's daughters (Ex. 6 at 17-18). Even though Kathleen Craig was in prison at the time of trial for methamphetamine charges, she would have made herself available to be deposed (Ex. 6 at 18-21). Leftwich had no reason for failing to call Kathleen Craig (Sept. R.Tr. 254).

The motion court found counsel was not ineffective as follows: Counsel did not call David Bolin because of her suspicions about him that he might have been involved in the killings (Sept.R.Tr.315,317) which constituted reasonable

strategy (R.L.F.907). Dale Christeson was unable to provide the type of evidence counsel wanted to present and the information he could have provided would have been cumulative (R.L.F.907-08). Laura Bolin would not have supported counsel's mitigation theory (R.L.F.909). Kathleen Craig was in prison at the time of trial which made her unavailable and she was not credible because she was in prison and had not reported to anyone the sexual abuse of Mr. Christeson by his mother (R.L.F.913-14).

The motion court found that witnesses Jerry Christeson (R.L.F.909), Debbie Bullock (R.L.F.910), Chester Bockover (R.L.F.910), Melissa Kenney (R.L.F.912), Kevin Bolin (R.L.F.915), Carmen Bolin (R.L.F.915), Joseph Bolin (R.L.F. 927) could not have provided persuasive mitigating evidence that would have altered the result. The testimony of Anna Christeson (R.L.F.908) and Terry Bolin (R.L.F.914) would have been cumulative to what was presented.

C. <u>Counsel Was Ineffective</u>

In *Terry Williams v. Taylor*, the Court found counsel was ineffective for failing to present available mitigating evidence, even though counsel had presented a substantial mitigation case, because counsel failed to present other types of available mitigation evidence. *Terry Williams v. Taylor*,529U.S. at 369,395-98. Likewise in *Wiggins*, the Court found counsel was ineffective for presenting only a partial mitigation case that was the product of inattention and not reasoned strategic judgment. *See Wiggins*,123S.Ct. at 2537,2542. Similarly, in *Simmons v. Luebbers*,299F.3d929,936-41(8th Cir.2002), the court found that

counsel was ineffective for failing to present available background information about Simmons that was mitigating, in addition to the mitigating evidence counsel did present. Like *Taylor*, *Wiggins*, and *Simmons* counsel failed to present other available mitigation evidence and counsel presented only a partial mitigation case that was the product of inattention and not reasoned strategic judgment.

The evidence of Mr. Christeson's positive personal attributes would have been highly persuasive to the jury and served only to complement counsel's dysfunctional family theory. That evidence would have made the penalty case more powerful and persuasive because the jury could have seen that despite the substantial adversity Mr. Christeson had encountered, he had personal qualities that warranted a life sentence. Evidence of Mr. Christeson's non-violent and non-aggressive behaviors would have served to counter the violent picture respondent painted of him through Carter. *See* Point I. Further, it was important for the jury to hear that Mr. Christeson was more than a victim of his family dysfunction and instead had risen above it by working hard, was trusted with others' money and credit, and was a truthful person. The evidence of the sexual and verbal abuse endured was something that would have fit within counsel's dysfunctional family theory, but simply was absent.

In *Terry Williams v. Taylor*, the Court indicated that in reviewing counsel's effectiveness, as to the mitigation case presented in a case, that courts are to assess the totality of the mitigation case that could have been presented and not judge evidence according to a single item of omitted evidence notion. *Terry Williams v.*

Taylor,529U.S. at 397-99. Applying a totality analysis review to the evidence of Mr. Christeson's positive attributes and sexual and verbal abuse endured that could have been combined with evidence of family dysfunction presented, requires finding counsel was ineffective.

The motion court is wrong as to those witnesses that it found could not have provided mitigating evidence and were cumulative because all of the evidence these witnesses would have provided was mitigating and none of it was presented at trial. Contrary to the motion court's findings, counsel did not fail to call David Bolin because of her suspicions about him. Counsel's stated reasons for not calling David Bolin was that he could not present evidence that fell within her mitigation theory (Sept.R.Tr.253). Moreover, counsel testified that David Bolin had furnished information about Mr. Christeson's positive personal qualities (Sept.R.Tr.275), yet she just did not present that evidence even though it was made available to her.

The motion court is wrong again as to those witnesses that it found counsel was not ineffective for failing to call because they did not fit into counsel's dysfunctional family theory. In order for trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003). It was not reasonable for counsel to present a dysfunctional family mitigation theory to the exclusion of presenting evidence about Mr. Christeson's positive personal characteristics. *See Terry Williams v*. *Taylor*, *Wiggins,* and *Simmons v. Luebbers*, *supra*. Furthermore,

counsel testified that she never considered presenting evidence of Mr. Christeson's positive personal qualities (Sept.R.Tr.274-75).

The motion court's findings are, likewise, wrong as to Kathleen Craig. She was not unavailable at trial because she was willing to give a deposition (Ex. 6 at 18-21). It is irrelevant the motion court found her not credible because the issue is whether the jury might have found her convincing. *Kyles v. Whitley*,514U.S.419,449 n.19(1995). The motion court found her not credible because she was in prison (R.L.F.913-14). The respondent, however, also called Vernon County Jail inmate witnesses Wagner and Milner. *See* Point II. The jury should have been afforded the opportunity to assess Kathleen Craig's credibility, just as it did respondent's jail witnesses. Additionally, a different family member reported other sexual abuse of Mr. Christerson by his mother that involved her grabbing his testicles (Sept.R.Tr.71-72). *See* Point VII. The credibility of Kathleen Craig's testimony would have been enhanced because sexual abuse of Mr. Christeson by his mother was reported by another family member. The jury heard evidence about Linda Christeson's neglect and physical beatings from witnesses who were called. If Craig had been called in conjunction with the witnesses who testified about Linda's actions, then there is substantial reason to believe the jury would have credited Craig's testimony about sexual and verbal abuse. The jury would have viewed Craig's testimony as more evidence of a dysfunctional family that was of a different kind - sexual and verbal abuse. Moreover, this evidence clearly fit within counsel's dysfunctional family theory.

Reasonably competent counsel under similar circumstances would have called these witnesses. Mr. Christeson was prejudiced because there is a reasonable probability the jury would have voted for life had these witnesses been called. *See Terry Williams v. Taylor* and *Wiggins*, *supra*. This Court should order a new penalty phase.

VII. DR. DRAPER - INCOMPLETE EVIDENCE

The motion court clearly erred when it denied the claims counsel was ineffective for failing to present testimony through Dr. Draper based on documents containing personal background information about Mr. Christeson and for failing to also admit into evidence those documents which dealt with his father's schizophrenia (Exhibits 42, 43, 44), the gravity of his mother's mental disabilities (Exhibit 37), Mr. Christeson's learning disabilities (Exhibit 35), and also failed to present through Dr. Draper evidence that Mr. Christeson was sexually abused and subjected to viewing altercations between his mother and William Christeson, because Mr. Christeson was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances would have presented all of this information through Dr. Draper and offered into evidence these documents and Mr. Christeson was prejudiced because there is a reasonable probability that the jury would have imposed life.

The jury heard testimony from Dr. Draper, but they did not hear the complete picture. The jury did not hear evidence about Mr. Christeson's father's schizophrenia, the gravity of his mother's mental disabilities, and Mr. Christeson's learning disability. The jury also did not hear that Mr. Christeson was sexually abused and subjected to viewing physical altercations between his mother and William Christeson. Counsel was ineffective in failing to present the additional

available evidence because these matters fit within counsel's dysfunctional family theory. Mr. Christeson was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

A. <u>Trial Testimony, Counsel's Testimony, And Findings</u>

Child development psychologist, Dr. Draper, testified at trial. She described an incident in which Mr. Christeson's mother, Linda, locked him out in the snow when he was young and the effects of such actions (T.Tr.1669). Also, she reported about physical beatings Linda inflicted on Mr. Christeson (T.Tr.1669-70). Dr. Draper also recounted Mr. Christeson's feelings of rejection resulting from Linda's treatment of him (T.Tr.1674). She also recounted the problems created by the multiple family moves Mr. Christeson experienced (T.Tr.1669-72). She also explained that the death of the man who Mr. Christeson thought was his father, William Christeson, was especially traumatic because Mr. Christeson did not have the benefit of having another stable parent (T.Tr.1670-71,1674).

Mr. Christeson's mother testified at trial that she had manic depressive illness and had been hospitalized (T.Tr.1611-12).

Counsel did not have any reason for failing to ask Dr. Draper about anything that would have impacted on Mr. Christeson's development (Sept.R.Tr.276-77). She did not have any reason for failing to offer into evidence record exhibits numbers 35, 37, 42, 43, and 44 (Sept.R.Tr.264-69). She knew that John Christeson, and not William Christeson, was Mark Christeson's real father (Sept.R.Tr.263-64).

The motion court found counsel was not ineffective for failing to present additional evidence through Dr. Draper because the additional evidence would not have been persuasive or credible (R.L.F.927-28). The court also ruled that there is no requirement to present a complete life history of a defendant (R.L.F.927-28). The court also found that the jury did hear the difficulties Mr. Christeson encountered, but still chose not to mitigate his punishment (R.L.F.928). Finally, the court found that counsel could have reasonably decided not to present the additional evidence because it could have '"backfire[d]"' based on the crime's circumstances (R.L.F.928).

The motion court rejected all claims related to counsel's failure to introduce records (R.L.F.918-25). In particular the motion court found that counsel's repeated testimony that she did not have a reason for failing to offer the records was not credible (R.L.F.918-25).

B. <u>Evidence The Jury Never Heard</u>

Exhibits 42, 43, and 44, contained the psychiatric treatment records for John Christeson. At trial, Linda testified that her brother-in-law John, and not her

husband William Christeson, was Mr. Christeson's real biological father (T.Tr. 1607-09). In 1957, John was found not guilty by reason of insanity on a stealing charge, diagnosed with schizophrenia, and spent about five years at Fulton State Hospital (Ex. 42 at 122; Ex. 43 at 2,5-6; Ex. 44 at 12-13). He had multiple other hospitalizations at state mental health facilities (Ex. 43 at 3,8,17). In 1987, John was found not competent to stand trial on stealing and burglary charges (Ex. 43 at 8, 15-16). Besides being schizophrenic, John is mildly mentally retarded, reads at a second grade level, and has math skills of a kindergartener (Ex. 43 at 5,18). John's symptoms have included auditory hallucinations and delusions and they are treated with anti-psychotic drugs (Ex. 42 at 123,129). His condition causes him to be unable to work and he receives SSI and Medicaid (Ex. 42 at 109,134).

Exhibit 37, mental health treatment records for Mr. Christeson's mother, reflected special education learning disabilities and particular problems with reading and writing (Ex. 37 at 6,26). She presented as "stealing impulsively" and as having "an impulse control disorder." (Ex. 37 at 10). Her impairments suggested that she would likely need a guardianship or conservatorship (Ex. 37 at 10).

Exhibit 35, Mr. Christeson's school records, reflect significant academic problems. In many categories on Missouri standardized testing for grades seven through ten, he had percentile score ranks that placed him in less than the bottom ten percent (Ex. 35 at 5). In eighth grade, his reading score percentile rank was 2% and math was 3% (Ex. 35 at 5). The records showed that Mr. Christeson

followed a special education curriculum because of learning disabilities, particularly in written expression and math (Ex. 35 at 13,18). The learning disabilities "adversely affect[ed] school functioning." (Ex. 35 at 18-19).

Dr. Draper indicated that she had begun to do a more comprehensive investigation and inquiry into Mr. Christeson's developmental circumstances, but was told by the trial counsel to stop because they had decided to pursue a different direction (Sept.R.Tr.98). Dr. Draper reviewed for the 29.15, Exhibits 35, 37, 42, 43, and 44, (Sept.R.Tr.47-50). These exhibits are the type of documents someone with Dr. Draper's expertise relies on to formulate her opinions (Sept.R.Tr. 50-51). She also utilized charts, Exhibits 50-53, to explain the additional matters she could have presented.

Dr. Draper described Bolin Hill as having about eleven trailer homes that were not in good condition with about thirty-five people living there (Sept.R.Tr.87). Some people actually lived in a bus (Sept.R.Tr.87). She characterized Bolin Hill as "a big junkyard where people lived in and amongst the junk and the chicken yards and the animal pens." (Sept.R.Tr.87). Most of the people on Bolin Hill received some sort of government financial assistance for physical or mental disabilities (Sept.R.Tr.95).

Dr. Draper noted that John Christeson, rather than William Christeson, was actually Mr. Christeson's biological father (Sept.R.Tr.57). Because John was Mr. Christeson's biological father, his schizophrenia and mental retardation were relevant to Mr. Christeson's developmental background. *See supra*.

Dr. Draper recounted that when Mr. Christeson was sixteen months old he was treated for second degree burns on his face and shoulders and the treating physician suspected child abuse (Sept.R.Tr.63). Mr. Christeson was exposed to physical and verbal altercations between his mother and William (Sept.R.Tr.66).

Dr. Draper read Kathleen Craig's deposition which recounted an act of sexual abuse done to Mr. Christeson by his mother (Sept.R.Tr. 71). *See* Point VI for details of that abuse. Also a second brand of sexual abuse involving Mr. Christeson's mother waking her sons up by grabbing their testicles was reported by a different family member. (Sept.R.Tr.71-72). One of Linda's male friends forced Mr. Christeson to have oral sex with him on multiple occasions (Sept.R.Tr.73). During one of those occurrences, Mr. Christeson attempted to flee and while doing so broke his arm (Sept.R.Tr.72-73).

Dr. Draper also recounted that Mr. Christeson was identified as learning disabled and the resulting difficulties he had with school (Sept.R.Tr.78,85-86,89). She noted Mr. Christeson had great difficulties with math and written expression (Sept.R.Tr.96-97).

In *Terry Williams v. Taylor*,529U.S.362(2000) the Court found counsel was ineffective for failing to present available mitigating evidence, even though counsel had presented a substantial mitigation case, because counsel failed to present other available mitigation evidence. *Terry Williams v. Taylor*,529U.S. at 369,395-98. Likewise, in *Wiggins v. Smith*,123S.Ct.2527,2537,2542(2003) the Court found counsel was ineffective for presenting only a partial mitigation case

that was the product of inattention and not reasoned strategic judgment. Similarly, in *Simmons v. Luebbers*,299F.3d929,936-41(8th Cir.2002), the court found that counsel was ineffective for failing to present available background information about Simmons that was mitigating, in addition to the mitigating evidence counsel did present.

All of the omitted evidence would have fit within counsel's theory of presenting family dysfunction (Sept.R.Tr.252), yet counsel failed to elicit through Dr. Draper information that was available in the referenced documents and from other individuals like Kathleen Craig. The jury only heard a portion of what could have been presented through Dr. Draper. If the jury had heard these other compelling, persuasive matters from Mr. Christeson's developmental background, along with what it did hear, then there is a reasonable probability it would have voted for life.

In *Terry Williams v. Taylor*, the Court indicated that in reviewing counsel's effectiveness, as to a mitigation case presented, that courts are to assess the totality of the mitigation case that could have been presented and not judge evidence according to a single item of omitted evidence notion. *Terry Williams v. Taylor*,529U.S. at 397-99. The motion court's findings that there is not a requirement to present a complete life history and that presenting the available evidence could have "backfired" is simply contrary to the *Terry Williams v. Taylor* and *Wiggins* requirement that the totality of what could have been presented is the yardstick against which counsel's performance is to be judged. Moreover, counsel

did not testify that she was concerned that presenting this other evidence would have "backfired," but rather the motion court itself supplied such a consideration based on no evidentiary support. In fact, that finding expressly contradicts counsel's testimony that she did not have any reason for failing to present through Dr. Draper any matters that could have impacted Mr. Christeson's development (Sept.R.Tr.276-77). The multiple matters omitted here, when viewed together and not in isolation, would have made the defense case for life especially compelling, and therefore, counsel was ineffective. *See Terry Williams v. Taylor* and *Wiggins*.

In order for trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003). The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). Counsel directed Dr. Draper not to pursue these other matters (Sept.R.Tr.98), but these matters fit within counsel's dysfunctional family mitigation theory. That action was not reasonable and the failure to present the other available evidence related to trial preparation and not strategy. *See Wiggins* and *Kenley, supra*. Counsel did not perform as reasonably competent counsel when she failed to elicit through Dr. Draper this other mitigating evidence and failed to offer into evidence documentary support for what Dr. Draper was able to testify about. *See Terry Williams v. Taylor and Wiggins, supra*. Mr. Christeson was prejudiced because there is a reasonable

probability the jury would have imposed life, if this evidence had been before it. *See Terry Williams v. Taylor* and *Wiggins, supra*.

This Court should order a new penalty phase.

VIII. JUDGE DARNOLD LACKED AUTHORITY TO SERVE

The motion court, Judge Darnold, clearly erred when he denied the motion to disqualify him on the grounds that he lacked constitutional or statutory authority to serve, in violation of Mo. Const. Art. I § 1, Art. V §§19 and 26, and §476.681 because he was not qualified to serve on a case in the Twenty-Eighth Judicial Circuit (Vernon County) because he was defeated after a contested election, and thereby, denied Mr. Christeson his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV and Mo. Const. Art. I § 10 and 21, in that Judge Darnold's appointment as a "Senior Judge" and service on a case in the Twenty-Eighth Judicial Circuit disregarded the intent of a majority of the voters in that Circuit who voted to elect his opponent such that Judge Darnold rendered a judgment in Mr. Christeson's case without either constitutional or statutory authority to serve on his case.

Judge Darnold denied the motion to disqualify him. The motion to disqualify should have been granted because Judge Darnold serving as a "Senior Judge" in the Twenty-Eighth Judicial Circuit disregarded the intent of that Circuit's voters who elected Judge Darnold's opponent in a contested election. Judge Darnold's serving on Mr. Christeson's case denied him his rights to due process and to be free from cruel and unusual punishment, U.S. Const Amends. VIII and XIV and Mo. Const. Art. I §§10 and 21, because Judge Darnold lacked constitutional or statutory authority to render a judgment in this case.

Because the death penalty is qualitatively different from a term of imprisonment "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*,428U.S.280,305(1976). That reliability was lacking here because Judge Darnold lacked constitutional or statutory authority to serve.

In 1999, Judge Darnold presided over Mr. Christensen's trial and sentencing (R.L.F.306; Apr.R.Tr.4-38). In November, 2000, he lost his judgeship in a contested reelection when the voters in the Twenty-Eighth Judicial Circuit elected Judge Bickel (R.L.F.306-07; Apr.R.Tr.4-38). Despite that loss, this Court, in November, 2001, assigned Judge Darnold under Art. V §26.3 as a "Senior Judge" to this Rule 29.15 (R.L.F.10,306-07). Judge Darnold held a hearing and entered a judgment against Mr. Christeson (R.L.F.772-941).

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). It has been the traditional rule in Missouri that judges cannot serve beyond their fixed term or after a successor judge has taken office. *See State v. Perkins*,95 S.W.2d75,77-78(Mo.banc1936) (judge became disqualified to try case by reason of expiration of his term of office). Article V §19 provides that circuit judges' terms are for six years. For Judge Darnold, his reelection defeat meant that his judicial tenure ended when his six year term expired. That term had expired prior to when this 29.15 action was brought (R.L.F.306-07;Apr.R.Tr.4-38).

Article V §26.3 provides that "[a]ny retired judge" may be assigned by this Court as "a senior judge" and "shall have the same powers as an active judge." Section 476.681.1 provides that "[a]ny retired judge" can apply to be "a senior judge." Judge Darnold did not *retire* from his judicial office, but instead *lost* his judicial authority when he *lost* his reelection bid and his six year term expired. Because Judge Darnold did not retire there was no constitutional or statutory authority to appoint him as a "Senior Judge."

Article I §1 of the Missouri Constitution provides: "That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." The fundamental rule of constitutional construction is that courts must give effect to the intent of the voters in adopting the constitution. *Barnes v. Bailey*,706S.W.2d25,28-29(Mo.banc1986).

In *Ederer v. Dalton*,618S.W.2d644,645(Mo.banc1981), the voters of a school district in 1976 approved in an election a two-year increase in the operating levy for the school district. In 1978, the school district submitted a proposition to voters to "retain" the higher operating levy; the voters defeated that proposition. *Id*. Despite this defeat and a third related defeat, the school district continued to assess the higher operating levy. The district claimed that Article X, Sec. 11(c) of the Missouri Constitution allowed the district to do this because it provided that "the last tax rate approved shall continue and the tax rate need not be submitted to the voters." *Id*. at 646. The district argued that because it was not required to

have submitted the tax rate to voters in 1978 for retention, it should be able to continue the higher rate. *Id*. at 645-46. This Court, however, disagreed holding that the constitutional provision "cannot reasonably be read . . . to permit indefinite continuation of a tax rate approved by voters for a limited period of time. To permit such a continuation would defeat the expectation of voters. It would in effect be a fraud on those voters who were in favor of an increase, but only because of a belief that it would be in effect for a limited period." *Id*.

Appointing Judge Darnold to serve as a "Senior Judge" in the Twenty-Eighth Judicial Circuit defeated the expectation of the majority of the voters from that Circuit who must have believed that by voting not to reelect Judge Darnold that he would not serve as a judge there. *See Ederer*. That appointment disregarded the will and intent of the voters. *See* Article I §1 and *Barnes*. Moreover, the appointment constituted a fraud on the majority of voters who believed that by electing Judge Darnold's opponent that Judge Darnold would no longer serve on cases in the Twenty-Eighth Circuit. *See Ederer*. Some voters may have voted for Judge Darnold's opponent because they did not want Judge Darnold to again serve in any proceedings related to Mr. Christeson's case. Regardless, the will of the voters must be given manifest effect. The majority of voters did not want Judge Darnold to continue to serve. Because Judge Darnold lacked constitutional or statutory authority to serve, Mr. Christeson was denied his Federal and State Constitutional rights to due process and to be free from cruel and unusual punishment.

This case presents circumstances similar to those found *in Nguyen v. United States*,123S.Ct.2130(2003). There, the Court reversed a Court of Appeals decision because a judge who was not an Article III judge sat on the three judge court of appeals panel that affirmed, without a dissent, the defendants' convictions. *Nguyen*,123S.Ct. at 2133. Those circumstances violated Congress' statutory grant of authority that permits district court judges to serve on courts of appeals. *Nguyen*,123S.Ct. at 2134-35. The case was remanded to the court of appeals for review before a new properly constituted panel because the limited statutory grant of authority '"embodies a strong policy concerning the proper administration of judicial business."' *Nguyen*,123 S.Ct. at 2138 (quoting Glidden v. Zdanok,370U.S.530,536(1962)). *See*, *also*, *U.S. v. Scott*,260F.3d512,515(6thCir.2001)(seized drugs ordered suppressed because retired state court judge lacked authority to issue search warrant). Similarly, here the limited constitutional and statutory authority to appoint Senior Judges reflects a strong policy relating to the proper administration of judicial business. The strong policy which must be safeguarded here is the Twenty-Eighth Circuit's voters' intent to have a judge other than Judge Darnold serve in their Circuit.

This Court should reverse for a new hearing before a judge who has constitutional and statutory authority to serve.

IX. COUNSELS' INEFFECTIVENESS - RESPONDENT'S ARGUMENTS

The motion court clearly erred in denying the claims counsel was ineffective for failing to properly object to and fully preserve objections to respondent's improper arguments which included:

A. In penalty rebuttal respondent argued that Mr. Christeson had failed to acknowledge his responsibility even though Mr. Christeson had exercised his right not to testify in penalty and;

B. In guilt rebuttal references to different versions of a sign that appeared above Christ's head on the cross

because Mr. Christeson was denied his rights to effective assistance, due process, to not testify and incriminate himself, and freedom from cruel and unusual punishment, U.S. Const. Amends. V, VI, VIII, and XIV in that reasonably competent counsel under similar circumstances would have properly objected to these arguments and fully preserved these matters and there is a reasonable probability that Mr. Christeson would not have been convicted of first degree murder or at minimum been sentenced to life.

Trial counsel failed to properly object to and fully preserve objections to respondent's improper closing arguments. Mr. Christeson was denied his rights to effective assistance, due process, to not testify and incriminate himself, and freedom from cruel and unusual punishment. U.S. Const. Amends. V, VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). A death sentence constitutes cruel and unusual punishment if imposed arbitrarily and capriciously. *Furman v. Georgia*,408U.S.238(1972). The trial and punishment phases of a capital case must satisfy due process. *Gardner v. Florida*,430U.S.349,358(1977).

A. <u>Mr. Christeson's Decision Not to Testify Highlighted</u>

Mr. Christeson testified in guilt, but not in penalty (T.Tr.1399-1424). In penalty rebuttal, respondent argued "this man maintains the lie that he told you from the witness stand. To this moment, he does not acknowledge responsibility for these acts. He maintains that lie. I think you ought to consider that." (T.Tr.1722;App.A26).

Counsel had no reason for failing to object (Sept.R.Tr.375). The motion court found this argument was proper because the prosecutor was commenting on Mr. Christeson's lack of remorse and not his failure to testify because he had testified (R.L.F.891).

In *State v. Dexter*,954S.W.2d332(Mo.banc1997), this Court reversed the defendant's conviction and death sentence because of respondent's references to his post-*Miranda* warnings silence. Those references included questioning for which an objection was sustained that highlighted that the defendant did not offer

an exculpatory statement, in response to a detective's allegations that his statements were untruthful, because he had invoked his *Miranda* rights by asking for an attorney. *Dexter*,954S.W.2d at 339.

Respondent's argument here did the same thing as its questioning did in *Dexter*. The respondent told the jury that Mr. Christeson's guilt testimony was not truthful and he should have testified in penalty and acknowledged his responsibility. This argument constituted an improper reference to Mr. Christeson's right not to testify in penalty. *See Owen v. State*,656S.W.2d458,459-60(Tex. Crim. App.1983) (prosecutor's argument that defendant who testified in guilt, but not in penalty phase had opportunity in penalty to say he was sorry violated right to silence and to not testify). This argument only made more prejudicial counsels' ineffectiveness in having failed to request a "no adverse inference instruction" in penalty. *See* Point X.

Reasonably competent counsel under similar circumstances would have objected to this improper argument. Mr. Christeson was prejudiced because there is a reasonable probability that without the "no adverse inference" instruction and this argument that Mr. Christeson would not have been sentenced to death.

B. <u>Sign Over Christ's Head</u>

In guilt rebuttal argument, respondent told the jury that there are four Bible gospels and that each contains a different rendition of what sign appeared above Christ's head on the crucifix (T.Tr.1497-99;App.A27). According to respondent, the different stories Carter told were like the differences that appear in the four

biblical accounts of Christ's death (T.Tr.1497-99;App.A27). Counsel objected to some of these arguments, but failed to fully preserve his objections. Even though the objections were not fully preserved, this Court found this argument was proper to highlight that different accounts of an event can vary in the details while remaining consistent overall. *Christeson*,50S.W.3d at 269.

Counsel did not know why he failed to include all the proper grounds for objecting (Sept.R.Tr.205-06). The motion court found that the objection that was made was overruled and there was no reasonable probability of a different result (R.L.F.871).

Counsel's failure to make timely proper objections can constitute a basis for finding counsel was ineffective. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995) (counsel was ineffective for failing to object to penalty arguments). This Court has recognized that matters that do not rise to the level of plain error manifest injustice can still constitute ineffective assistance of counsel. *Deck v. State*,68S.W.3d418,425-31(Mo.banc2002).

A death sentence must appear to be based on reason, not caprice or emotion. *Gardner v. Florida*,430U.S. at 358. In *State v. Debler*,856S.W.2d641,656(Mo.banc1993), this Court noted that the decision between life and death "should not turn on the most compelling Scriptural parallel." *See, also, State v. Whitfield*,837S.W.2d503,513(Mo.banc1992) (prosecutor's arguments injecting Scripture were "troubling"). In *Debler*, this

Court cautioned against "excessive Biblical" references. *Debler*,856S.W.2d at 656.

The prosecutor's argument did more than highlight what this Court held was permissible. Reasonably competent counsel under similar circumstances would have objected on the grounds that this argument injected irrelevant excessive Biblical references that allowed the prosecutor to hold himself out as a Christian well versed in the Bible and that the justice of his position was established because Christ must be on his side. Mr. Christeson was prejudiced because there is a reasonable probability the jury would not have convicted him of first degree murder.

For all the reasons discussed, this Court should reverse for a new trial or at minimum a new penalty phase.

X. INEFFECTIVENESS ON INSTRUCTIONS

The motion court clearly erred in denying the claims that counsel was ineffective in failing to object to multiple instructional errors including the failure:

A. To request a "no adverse inference" to be drawn from Mr. Christeson not testifying in penalty instruction;

B. To give MAI-CR3d 313.46A, the instruction that death is never required, after the corresponding series of instructions for Counts I and II;

C. To object to guilt Instructions 6, 9, and 12 on the grounds these instructions did not make clear the jury must attribute deliberation to Mr. Christeson, and not Carter, to convict of first degree murder and the submission of converse Instructions 7, 10, and 13 which were similarly defective;

D. To object to Instruction 21, verdict director on aggravators for Susan Brouk's death, on the grounds that it does not make clear that a finding of depravity of mind must be premised on the acts and intent of Mr. Christeson and not Carter

in that Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, to not incriminate himself, and effective assistance of counsel, U.S. Const. Amends. V, VI, VIII, and XIV as reasonably competent counsel under similar circumstances would have ensured the jury was properly instructed and Mr. Christeson was prejudiced as there is a

reasonable probability he would not have been convicted of first degree murder or at minimum sentenced to life.

Counsel failed to object and/or submitted several improper instructions. Reasonably competent counsel under similar circumstances would have objected and/or acted to ensure proper instructions were submitted and Mr. Christeson was prejudiced because there is a reasonable probability he would not have been convicted of first degree murder or at minimum sentenced to life. Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, to not incriminate himself, and effective counsel. U.S. Const. Amends, V, VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). The failure of counsel to ensure the jury is properly instructed in penalty has resulted in finding counsel was ineffective. *Deck v. State*,68S.W.3d418,429-31 (counsel ineffective for failing to include mitigation paragraphs or failing to object to their absence);*Carter v. Bowersox*,265F.3d705,713-16(8thCir.2001) (appellate counsel ineffective for failing to raise as a matter of plain error omission of instruction on second step of process for assessing punishment in death case).

A. <u>Failure to Request No Adverse Inference Instruction</u>

Mr. Christeson testified in guilt, but did not testify in penalty (T.Tr.1399-1424,1596-1682). Trial counsel did not request a "no adverse inference" to be drawn from Mr. Christeson not testifying in penalty phase instruction similar to what is provided for in MAI-CR3d 308.14 (App.A47).

The Fifth Amendment "requires that a criminal trial judge must give a 'no-adverse-inference' jury instruction when requested by a defendant to do so." *Carter v. Kentucky*,450U.S.288,300(1981). In *Estelle v. Smith*,451U.S.454,462-63(1981), the Court stated: "[w]e can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." This Court has reversed death sentences for failing to give the "no adverse inference" instruction in penalty. *State v. Storey*,986S.W.2d462(Mo.banc1999); *State v. Mayes*,63S.W.3d615(Mo.banc2001). This Court has also found the failure to give such an instruction in penalty was harmless because the jury would not have expected the defendant to testify in penalty and not drawn a negative inference from the failure to testify. *State v. Edwards*,116S.W.3d511,539-43(Mo.banc2003).

Counsel had no reason for failing to request a no adverse inference instruction in penalty and did not consider requesting it (Sept.R.Tr.350-51). The motion court rejected this claim citing *Love v. State*,670S.W.2d499,502(Mo.banc1984) for the proposition that counsel cannot be found ineffective for failing to request an available instruction and it was

reasonable strategy for counsel not to have requested the instruction to avoid highlighting Mr. Christeson chose not to testify in penalty (R.L.F.936-37).

This case is like *Storey* and *Mayes*, and unlike *Edwards*, in the need for the jury to have heard the "no adverse inference" instruction. Here, the jury would have expected to hear Mr. Christeson testify in penalty to deny Wagner's accusation that Mr. Christeson sexually assaulted him in the Vernon County Jail and to deny or explain the statement "Of course I did but they ain't got shit on me" as attributed to him and testified to by Milner. *See* Point II. Reasonably competent counsel under similar circumstances would have requested a "no adverse inference" instruction. Mr. Christeson was prejudiced because the jury was likely to infer Wagner's sexual assault accusation was true and that Mr. Christeson made the statement Milner attributed to him because he did not testify to refute these matters. Further, Mr. Christeson was prejudiced because there is a reasonable probability that had the jury heard a "no adverse inference" instruction that life would have been imposed.

The motion court clearly erred in making a strategy finding because counsel testified that she simply had not considered requesting the instruction (Sept.R.Tr.350-51). Further, the decision in *Love* is inapplicable because there counsel testified it was his strategy not to request a manslaughter instruction, in a second degree murder prosecution, because of the risk of confusing the jury as such an instruction was inconsistent with the defense theory that the defendant was innocent of the killings. *Love*,670S.W.2d at 501. Moreover, the decisions in

Carter v. Kentucky and *Estelle, supra*, make clear that counsel's failure to request this instruction establishes counsel did not act as reasonable counsel. A new penalty phase is required.

B. MAI-CR3d 313.46A - Death Is Never Required

MAI-CR3d 313.46A (App.A46) apprises the jury that it is never required to impose death. Note On Use 5(B)(2)(c) to MAI-CR3d 313.00 (Sept. 1999 version) directed that the trial court was to read MAI-CR3d instructions in the following order (1) 313.40; (2) 313.41A; (3)313.44A; (4) 313.46A; and (5) 313.48A (App.A39). That Note then directed that in cases where there was more than one count of first degree murder and death was not waived "*repeat this series of instructions for each such count.*" (Emphasis added) (App.A39).

In Mr. Christeson's case this scheme was not followed. Instruction 30 (T.L.F.543;App.A48) tracked MAI-CR313.46A and was given at the end of the verdict directors. This instruction was not repeated for each count immediately after MAI-CR3d 313.44A. That form instruction should have followed Instructions 23 (T.L.F.534;App.A49) and 26 (T.L.F. 538;App.A50), but was not given.

Counsel was not aware that MAI-CR313.46A was required to be repeated after each count (Sept.R.Tr.347-48). The motion court rejected this claim of error because during voir dire the jurors were told that death was not required and during argument (citing T.Tr.1716) counsel told the jury they did not have to impose death (R.L.F.934). These findings are clearly erroneous because the

instructions failed to comply with Note On Use 5(B)(2)(c) to MAI-CR3d 313.00 (Sept. 1999 version).

This omission upset the statutory and instructional scheme and unfairly biased the jury toward imposing death because the jury did not hear after each count that it was never required to impose death. The jury was instructed only one time at the end which minimized the importance of the instruction. Reasonably competent counsel under similar circumstances would have objected to this error and Mr. Christeson was prejudiced because there is a reasonable probability the jury would have imposed life. *See Deck and Carter v. Bowersox*, *supra*. This Court should order a new penalty phase.

C. Alternative Attributing Of Deliberation

Instructions 6, 9, and 12, and their related converses, Instructions 7, 10, and 13, all told the jury that it could convict Mr. Christeson of first degree murder if either Mr. Christeson or Carter had acted with deliberation (T.L.F.507-08,512-13, 517-18;App.A51-56). These instructions did not require that the jury find that Mr. Christeson had deliberated.

Counsel had no reason for failing to object to the use of the disjunctive in Instructions 6, 9, and 12 (Sept.R.Tr.142-45,351-54). Counsel did not object to converse Instructions 7, 10, and 13 because they submitted these instructions to track the verdict directors (Sept.R.Tr.354-56). The motion court ruled that the verdict directors were proper, and therefore, counsel was not ineffective (R.L.F.932).

In *State v. Ferguson*,887S.W.2d585,586-87(Mo.banc1994), this Court reversed the defendant's first degree murder conviction because the disjunctive verdict director allowed the jury to attribute deliberation to Ferguson or his co-defendant. The same was true of all the referenced instructions. Reasonably competent counsel under similar circumstances would have objected to the verdict directors and converses on the grounds that they allowed the jury to attribute deliberation to Mr. Christeson or Carter. *See Ferguson*. Mr. Christeson was prejudiced because there is a reasonable probability the jury convicted him of first degree murder without finding he deliberated. The prejudice to Mr. Christeson was only exacerbated because the prosecutor argued in his initial guilt argument that under the instructions the jury could convict Mr. Christeson of first degree murder if either he or Carter deliberated (T.Tr.1463-64;App.A57).

A new trial is required.

D. <u>Alternative Finding For Depravity</u>

Instruction 21 told the jury that a finding of the depravity of mind aggravator as to Susan Brouk's death could be based on the acts and intent of Mr. Christeson or Carter (T.L.F.531;App.A58). In particular, the jury was told that depravity could be found "if you find that the defendant and the other person killed Susan Brouk after she was bound or otherwise rendered helpless by the defendant *or* the other person." (T.L.F.531;App.A58) (emphasis added).

Counsel had no reason for failing to object to this disjunctive submission (Sept.R.Tr.356-58). The motion court found that this instruction complied with

MAI and that it did not matter whether Susan Brouk was bound and rendered helpless by Mr. Christeson or Carter because the depravity involved was that Mr. Christeson killed her after she was rendered helpless (R.L.F.932-33).

In *State v. Isa*,850S.W.2d876,901-03(Mo.banc1993), this Court reversed the defendant's death sentence because the instruction authorized the jury to assess the defendant's punishment on a finding of an aggravator based on the conduct of her co-defendant husband. Reasonably competent counsel under similar circumstances would have objected to an instruction which allowed the jury to impose death on the finding of an aggravator based on the conduct of co-defendant Carter. Mr. Christeson was prejudiced as there is a reasonable probability that the jury sentenced Mr. Christeson to death based on Carter's acts and intent and he would not have been sentenced to death absent this error. This Court should order a new penalty phase.

For all the reasons discussed, this Court should order a new trial or at minimum a new penalty phase.

XI. JUROR CONNER - AUTOMATIC DEATH JUROR

The motion court clearly erred when it denied the claim that counsel was ineffective for failing to strike Juror Conner who indicated that he would automatically impose death because Mr. Christeson was denied effective assistance, due process, right to a jury trial before a fair and impartial jury, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances would have moved to strike Conner and he was prejudiced because a juror who could not consider life served on his jury.

Juror Conner's voir dire testimony indicated that he would automatically impose death and could not consider life. Mr. Christeson was denied his rights to effective assistance, due process, a trial before a fair and impartial jury, and freedom from cruel and unusual punishment because Conner served on his jury. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*,366U.S.717,722(1961). To be qualified to serve as a juror in a death penalty case, a juror must be able to consider imposing a punishment other than death. *Morgan v. Illinois*,504U.S.719,728-29(1992). A

juror who would automatically vote for death is not qualified to serve because that juror cannot consider the mitigating circumstances as required by the instructions. *Morgan*,504U.S. at 729.

Venireperson Cole testified that he believed in the philosophy of "an eye for an eye" (T.Tr.99,101;App.A59-60). Cole stated that defense counsel would have to "come up with something pretty good" to not impose death because everyone is responsible for their actions (T.Tr.104;App.A60). When counsel began her questioning of Conner, she noted that she had seen Conner shaking his head in response to statements Cole had made (T.Tr.104-05;App.A60-61). Conner stated that he agreed with Cole as to "[t]he part there where he was talking about being responsible for your own actions." (T.Tr.105 L.18-20;App.A61) Conner went on to say: "Because if they did it, I'm just saying whatever. If they did it once, they can do it again, and so, I mean, it doesn't matter if they are sick or not, because to me they're not going to get better." (T.Tr.105 L.23- 106 L.2;App.A61). These statements indicated that Conner agreed with Cole's "eye for an eye" philosophy. Conner served on the jury (T.L.F.495).

Counsel McBride did not know why he did not move to strike Conner (Sept.R.Tr.128). Counsel Leftwich stated that there must have been some reason why she did not move to strike Conner (Sept.R.Tr.276). The motion court found counsel was not ineffective because Conner testified that he would hold the State to a higher burden of proof than beyond a reasonable doubt (R.L.F.799-800 citing

T.Tr.106). This finding, however, does not address the fact that once Conner was convinced of Mr. Christeson's guilt that he would automatically vote for death.

Reasonably competent counsel under similar circumstances would have moved to strike Conner for cause or struck him peremptorily. Mr. Christeson was prejudiced because a juror who could not consider a punishment other than death served on his jury. *See Knese v. State*,85S.W.3d628,631-33(Mo.banc2002) (counsel was ineffective for failing to strike jurors whose questionnaires indicated they would automatically vote for death).

In order for trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003). It was not a reasonable strategy to leave a juror on the case who could not consider life. *See Knese*.

This Court should order a new penalty phase.

XII. RESPONDENT'S CHANGE IN RESPONSIBILITY THEORY

The motion court clearly erred when it denied the claim that respondent improperly presented inconsistent theories as to Mr. Christeson's involvement when it presented evidence at Mr. Christeson's trial that he cut Kyle Brouk's throat and then at Carter's trial presented evidence Carter did that act because Mr. Christeson was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that the State is prohibited from using inconsistent theories to obtain multiple convictions and punishments for the same offense.

The motion court rejected the claim that respondent presented inconsistent theories in Mr. Christeson's trial and Carter's trial as to each person's involvement in Kyle Brouk's death. The respondent's action denied Mr. Christeson his rights to due process and freedom from cruel and unusual punishment. U.S. Const. Amends. VIII and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). It is recognized that because of the qualitative difference in the punishment of death that heightened reliability is required. *Woodson v. North Carolina*,428U.S.280,305(1976).

At Mr. Christeson's trial, Carter testified that it was Mr. Christeson who cut Kyle's throat (T.Tr.988-90). At Carter's subsequent trial, on cross-examination of him, respondent suggested it was Carter who cut Kyle's throat (Ex. 34C at 505). On Carter's direct appeal, the Southern District concluded that respondent had in

fact presented "simply two 'inherently factually contradictory theories."' *State v. Carter*,71S.W.3d267,272(Mo.App.,S.D.2002)(quoting *Smith v. Groose*,205F.3d1045(8thCir.2000)). The Southern District rejected Carter's claim finding he was not prejudiced. *Carter*,71S.W.3d at 272-73. Unlike Carter, Mr. Christeson was prejudiced.

In *Smith v. Groose*,205 F.3d at 1049-52, the court found the petitioner's right to due process was violated because the State used inconsistent, irreconcilable theories to secure convictions against co-defendants in separate trials. While so holding, that court noted that "[t]he State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." *Smith*,205F.3d at 1051.

Respondent's evidence and argument were focused on portraying Carter as merely a follower who Mr. Christeson led into committing the acts involved. *See* Point I. Carter's testimony that it was Mr. Christeson who was responsible for cutting Kyle's throat, and not him, was a substantial component in the overall effort to maximize Mr. Christeson's role and to minimize Carter's role. The misrepresentation of Carter's role and participation in Kyle's death was prejudicial to the jury's determination that Mr. Christeson was guilty of three counts of first degree murder because it was an important element of respondent casting Mr. Christeson as primarily responsible. Further, this evidence made Mr. Christeson's alleged role appear more aggravated to the jury as to punishment on all three counts.

The motion court rejected this claim on the grounds that counsel could not be ineffective for failing to predict that respondent would change its theory in Carter's subsequent trial (R.L.F.926). Also, it found that Mr. Christeson could not demonstrate what happened in Carter's trial months later prejudiced his trial (R.L.F. 926).

The motion court's findings, however, ignore that the claim pled was not an ineffective assistance of counsel claim (R.L.F. 171-72). This Court has recognized that claims other than ineffective assistance of counsel, and in particular due process and Eighth Amendment punishment reliability claims, are properly reviewable on 29.15. See *State v. Phillips*,940S.W.2d512,516-18(1997) (finding due process violation as to punishment when respondent failed to disclose audiotape with evidence exculpatory as to punishment). Further, Mr. Christeson was prejudiced because Carter's testimony in Mr. Christeson's trial advanced respondent's portrayal of Carter as a follower led by Mr. Christeson, but then respondent change its portrayal of Carter when it sought to convict him of first degree murder. This inconsistent, irreconcilable shift violated Mr. Christeson's rights to due process and to a reliable determination of his punishment. *See Smith v. Groose* and *Woodson v. North Carolina*, *supra*. That shift reflected a lack of regard for fairness and the search for truth. *See Smith v. Groose*, *supra*.

This Court should order a new trial on all three counts or at a minimum order a new penalty phase on all counts.

XIII. GENERALIZED PENALTY OPENING AND CLOSING

The motion court clearly erred in denying the claim that counsel was ineffective in giving a generalized penalty opening statement and closing argument because Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, and to effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel under similar circumstances would have given a comprehensive opening statement and closing argument that affirmatively explained why the mitigating evidence, considered in conjunction with the instructions, warranted life and Mr. Christeson was prejudiced because had counsel so acted there is a reasonable probability life would have been imposed.

Trial counsel gave a generalized penalty opening statement and closing argument. Counsel's opening statement and closing argument were ineffective because they failed to guide the jury in how the specific mitigating evidence in Mr. Christeson's case, when viewed in conjunction with the instructions, required a life sentence. Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, and to effective counsel. U.S. Consts. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise

customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

Counsel's penalty opening statement was two and one half pages (T.Tr.1543-45;App.A62). Much of the statement was devoted to informing the jury of the obvious: that the jury had reached the penalty phase (T.Tr.1543-44;App.A62). The jury was told in generalized terms it would hear how Mr. Christeson's mother had displayed love and concern for his brother Billy, but not him, because Mr. Christeson was born of an affair with her brother-in-law (T.Tr.1544-45;App.A62). Also the jury heard in general that there would be evidence presented about Mr. Christeson's response to the man he believed to be his father, William's, death (T.Tr.1545;App.A62). Finally, the jury was told that it would hear child development specialist, Dr. Draper, testify about how Mr. Christeson was an emotionally beaten-down child (T.Tr.1545;App.A62).

Counsel's penalty closing argument was five pages (T.Tr.1716-20;App.A63-64). The jury was told to consider that Carter would not get death because of his deal (T.Tr.1717,1720;App.A63-64). The jury heard that Mr. Christeson's mother had not wanted him and a picture of him as a young child appearing unhappy reflected his sadness (T.Tr.1718;App.A63). Counsel told the jury that when William died, Mr. Christeson turned himself off (T.Tr.1718;App.A63). The jury heard Mr. Christeson was eighteen when the offense happened and had no prior convictions (T.Tr.1719;App.A64). The jury was told to "consider everything" that it heard from Dr. Draper without any

elaboration about her testimony (T.Tr.1720;App.A64). The jury heard repeatedly that Mr. Christeson would die in prison no matter what the jury decided, but counsel never affirmatively told the jury why it should impose life (T.Tr.1717,1719,1720;App.A63-64).

Counsel testified that she should have affirmatively told the jury in opening statement and closing argument Mr. Christeson should be sentenced to life (Sept.R.Tr.284,368). The motion court ruled both opening statement and closing argument were reasonable (R.L.F.937). It found that in opening statement counsel apprised the jury what the mitigating evidence would be and that life should be imposed (R.L.F.937). As to closing argument, the court found that counsel had argued that there is a presumption in favor of life, the hardships Mr. Christeson had endured, and Mr. Christeson had been eighteen with no prior convictions (R.L.F.937).

Opening statements and closing arguments are important because they provide a structure and framework for how the jury should view and consider the evidence. *State v. Thompson*,68S.W.3d393,394(Mo.banc2002); *State v. Barton*,936S.W.2d781,783(Mo.banc1996). This Court noted in *Barton* that "[c]losing arguments are particularly important in capital cases where there are unique threats to life and liberty." *Barton*,936S.W.2d at 783. An effective penalty closing argument must focus the sentencer's attention on particular mitigating circumstances of the defendant's life circumstances that warrant a life sentence. *Hall v. Washington*,106F.3d742,750(7thCir.1997).

Counsel's opening statement did not outline in detail what mitigating evidence the jury should expect to hear from the witnesses who were going to testify and could not, since it covered only two and one-half pages (T.Tr.1543-45;App.A62). Counsel did not explain in opening statement what Dr. Draper did and why her testimony mitigated the offense. Counsel, likewise, did not tell the jury what statutory and non-statutory mitigators the evidence would establish. In contrast, the prosecutor told the jury what aggravators the evidence would establish, which he wanted the jury to find, and affirmatively told the jury it should impose death (T.Tr.1539-43). Counsel's opening statement failed to provide a sufficient framework for the jury to appreciate why the evidence it was about to hear was mitigating and explain how the instructions, when viewed with that evidence, required life.

In closing argument counsel, never affirmatively told the jury why life should be imposed (T.Tr.1717,1719,1720;App.A63-64). In contrast, the prosecutor's initial and rebuttal closing argument demanded death and repeatedly called on the jurors to impose death (T.Tr.1713,1715,1725;App.A65-67). Effective counsel would have argued the mitigating evidence in detail, while linking those details to the instructions, to explain why life was warranted.

Reasonably competent counsel under similar circumstances would have given a comprehensive opening statement and closing argument that explained why life should be imposed. Mr. Christeson was prejudiced because there is a

reasonable probability the jury would have imposed life had the jury been properly guided in opening statement and closing argument.

This Court should order a new penalty phase.

XIV. RING VIOLATION

The motion court clearly erred denying Mr. Christeson's claim that the information only charged him with unaggravated and not aggravated first degree murder and that trial and appellate counsel were ineffective for failing to raise this matter because Mr. Christeson was denied his rights to due process, a jury trial, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that the information failed to plead any aggravating circumstances such that Mr. Christeson was charged with only unaggravated first degree murder whose only authorized punishment is life. Further, reasonably competent trial and appellate counsel would have raised this matter and he was prejudiced because life was the only authorized punishment.

The information failed to charge Mr. Christeson with aggravated first degree murder when it did not allege any aggravating circumstances. For that reason, Mr. Christeson was charged with only unaggravated first degree murder and only subject to a life sentence. Mr. Christeson was denied his rights to due process, a jury trial, freedom from cruel and unusual punishment, and effective assistance of counsel because he was sentenced to death based on an information that did not charge aggravated first degree murder and counsel failed to challenge his death sentence on this ground. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise

customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). A defendant is entitled to effective appellate counsel. *Evitts v. Lucey*,469U.S.387,396-97(1985).

In *Jones v. United States*,526U.S.227,243 n.6 (1999), the Supreme Court announced a broad constitutional principle governing criminal cases that had only been implicit in its prior decisions: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Subsequently, *Apprendi v. New Jersey*,530U.S.466,476. (2000), applied this rule to the states through the Fourteenth Amendment. In a third case, *Ring v. Arizona*,536U.S.584,600,609(2002), the Supreme Court held this rule applies to eligibility factors in state capital prosecutions.

The information here did not charge any statutory aggravating facts which respondent must prove to sentence Mr. Christeson to death (T.L.F.44-48). Leftwich was not familiar with *Jones*. (Sept.R.Tr.329-31). McBride did not know why he did not object (Sept.R.Tr.150). Appellate counsel did not consider challenging the information under *Jones* and *Apprendi* (R.L.F.522-24). The motion court rejected this claim because respondent eventually gave notice of the

intended aggravating circumstances and this Court rejected the same claim in *State v. Cole*,71S.W.3d163(Mo.banc2002) (R.L.F.938-39)[2].

The Court's opinions suggest aggravating facts that must be found by a jury beyond a reasonable doubt are elements of a greater offense. *See, e.g., Sattazahn v. Pennsylvania*,537U.S.101,111(2003); *Harris v. United States*,536U.S.545,564(2002); *Ring v. Arizona*,536 U.S. at 609.

The logical corollary of the foregoing cases is this: aggravating circumstances, as elements of the greater offense of capital or *aggravated* murder, must be pled in the document charging capital or aggravated murder. This rule is in line with established federal law. "An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*,523U.S.224,228(1998). "[A] conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*,443U.S. 307,314(1979).

Although §565.020 may appear to establish a single offense of first degree murder for which the punishment is either life without probation or parole, or death, under *Ring, Apprendi, and Jones,* the combined effect of §§565.020 and 565.030.4 is to create, *de facto,* two kinds of first degree murder in Missouri: 1) *unaggravated* first degree murder, for which the elements are set out in

[2] This claim is presented because it is supported by recent authority from the United States Supreme Court and that Court has not decided this precise claim.

§565.020.1 and which does not require proof of any statutory aggravating circumstances; and 2) the greater offense of *aggravated* first degree murder.

The difference between charging *aggravated* and *unaggravated* first degree murder is constitutionally significant. In Missouri, to prosecute a defendant for *aggravated* first degree murder, the charging document must plead not only the elements of the lesser offense of *unaggravated* first degree murder; the charging document must also plead the statutory aggravating circumstances on which the State will rely to establish the defendant's death eligibility.

The State did not plead any statutory aggravating circumstances – or any of the facts required by §565.030.4 in the information charging Mr. Christeson with first degree murder. The state charged Mr. Christeson with the lesser offense of *unaggravated* first degree murder and that is the "greatest" offense of which he could have been properly convicted.

Although *Hurtado v. California*,110U.S.516(1884), holds the Indictment Clause of the Fifth Amendment does not apply to the states, *Hurtado* does not go so far as to say a state can be inconsistent in whatever processes and procedures it chooses to adopt. The Due Process Clause of the Fourteenth Amendment requires at a minimum that a state consistently follow the procedure elected for prosecuting criminal charges. Nor is *Hurtado* inconsistent with states being required, under the Due Process Clause of the Fourteenth Amendment, to adopt procedures for criminal prosecutions that provide the same kind and degree of notice of charges provided by a grand jury indictment.

The sentence of death imposed by the trial court violated Mr. Christeson's rights to jury trial, due process, freedom from cruel and unusual punishment, and reliable sentencing. U.S. Const. Amends. VI, VIII, and XIV. Alternatively, reasonably competent trial and appellate counsel would have raised this matter and Mr. Christeson was prejudiced because he was required to be sentenced to life. U.S. Const. Amend. VI.

This Court should order Mr. Christeson sentenced to life.

XV. INADEQUATE PROPORTIONALITY REVIEW

The motion court clearly erred when it rejected the claim that Mr. Christeson was denied meaningful proportionality review, trial counsel was ineffective for failing to present evidence to challenge this Court's proportionality review, and appellate counsel was ineffective for failing to challenge that proportionality review, because Mr. Christeson was denied his rights to due process, to be free from cruel and unusual punishment, and to effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV in that this Court refuses to consider all similar cases and to employ a frequency analysis, there is a lack of notice of the procedure to be followed with a meaningful opportunity to be heard, and there is not a complete database as required under §565.035. Further, reasonably competent trial and appellate counsel under similar circumstances would have challenged this Court's review on all these grounds. Mr. Christeson was prejudiced because he was entitled to a life sentence.

This Court failed to provide meaningful proportionality review of Mr. Christeson's death sentence because this Court refuses to consider all similar cases and to employ a frequency analysis, there is a lack of notice of the procedure to be followed with a meaningful opportunity to be heard, and there is not a complete database as required under §565.035. Trial counsel failed to present evidence to challenge this Court's proportionality review and appellate counsel also failed to challenge that review. Mr. Christeson was denied his rights to due process, to be

free from cruel and unusual punishment, and to effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). A defendant is entitled to effective appellate counsel. *Evitts v. Lucey*,469U.S.387,396-97(1985).

Sentencing someone to death is cruel and unusual punishment if the punishment is meted out arbitrarily and capriciously. *Furman v. Georgia*,408U.S. 238(1972). In those cases in which a state statute "indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." *Ford v. Wainwright*, 477U.S.399,428(1986)(O'Connor, J., concurring and dissenting). Under the Due Process Clause, a state-created right cannot be arbitrarily abrogated. *See Wolff v. McDonnell*,418U.S.539,557-58(1974). While appellate comparative proportionality review is not constitutionally mandated, see *Pulley v. Harris*,465 U.S.37(1984), because Missouri provides a statutory right of proportionality review, the State and this Court must comply with the requirements of the Due Process clause of the Fourteenth Amendment. By requiring independent proportionality review in §565.035.3, the Legislature has created a protected liberty interest.

This Court has refused to consider similar cases where punishments less than death have been imposed when conducting its proportionality review while confining its approach to finding similar cases where death was imposed. *State v. Black*,50S.W.3d778,794-95(Mo.banc2001) (Wolff, J. dissenting). *See, also*, *State v. Davis*,814S.W.2d593,607(Mo.banc1991) (Blackmar, J. dissenting) (Court uses aggravator definitions to compare death penalty cases to one another). In *Palmer v. Clarke*, 2003 WL 22327180 at *21 - *26 (Oct. 9, 2003 D. Neb.), the Court found Nebraska's proportionality review denied the petitioner due process because the review conducted only compared his death sentence to other death sentences and not to other homicides or first degree murders. That is precisely what this Court did in Mr. Christeson's case. *State v. Christeson*,50S.W.3d251,272-73(Mo.banc2001).

In *Harris v. Blodgett*,853F.Supp.1239,1286-91(1994),*aff'd*., *Harris v. Wood*,64F.3d1432(9thCir.1995), the District Court found that Washington's proportionality review violated Harris' rights to procedural due process because he was denied the right to have meaningful notice of the procedure to be followed with a meaningful opportunity to be heard. Like Harris, Mr. Christeson was not provided notice of the procedure to be followed with a meaningful opportunity to be heard.

Professor Wallace's work has found that this Court has failed to utilize available resources to conduct a meaningful frequency approach analysis to proportionality review and why three carried-out death sentences were

disproportionate (Ex. 46 *Proportionality Review* at 311,313 and *Comparative Proportionality* at 207-76).

Professor Galliher's statistical analysis of death eligible cases found disparities in death sentences that warranted setting aside those sentences and found there was a serious problem with this Court's database because this Court did not have trial judge reports for 189 death-eligible defendants (Ex. 47). Section 565.035.6 provides that this Court "shall accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed after May 26, 1977." The missing data establishes non-compliance with §565.035.6.

Trial counsel filed a motion that challenged this Court's proportionality review and attached Professor Wallace's Proportionality Review article (T.L.F.186-209). Trial counsel had no reason for failing to call Professors Wallace and Galliher to testify about their studies (Sept.R.Tr.286-88). Appellate counsel did not challenge this Court's proportionality review because this Court has rejected this claim previously, but did not consider raising this matter for federal court preservation (R.L.F.525-27). The motion court denied this challenge because this Court has previously rejected it (R.L.F.940-41).

This Court's proportionality review in Mr. Christeson's direct appeal was inadequate for all the reasons noted and his punishment of death should be set aside and life imposed. *See State v. Christeson*,50S.W.3d251,272-73(Mo.banc2001). Alternatively, reasonably competent trial counsel under similar

circumstances who was aware of Professors Wallace's and Galliher's studies would have presented as evidence their work as grounds for why Mr. Christeson could not obtain meaningful proportionality review and he was prejudiced because he should be sentenced to life. Lastly, reasonably competent appellate counsel under similar circumstances would have challenged this Court's proportionality review because trial counsel had filed a motion which challenged that review. Mr. Christeson was prejudiced because he should be sentenced to life.

This Court should order that Mr. Christeson be sentenced to life.

XVI. CLEMENCY ARBITRARINESS

The motion court clearly erred denying Mr. Christeson's claim that Missouri's clemency process violates his rights to due process, freedom from cruel and unusual punishment, and equal protection, U.S. Const. Amends. VIII and XIV, and that counsel was ineffective, U.S. Const. Amend VI, for failing to object to that process in that it is wholly arbitrary and capricious as the clemency of Darrell Mease evidences. Mease was granted clemency not on the merits of his case, but because of the Pope's appeal on religious grounds. Mr. Christeson was required to be sentenced to life because of this arbitrariness and counsel was ineffective for failing to assert this arbitrariness as grounds for requiring a life sentence.

The motion court denied the claim that Missouri's clemency process is arbitrary and capricious and that counsel was ineffective for failing to assert that grounds as requiring a life sentence. That ruling should be reversed because Missouri's clemency process violates Mr. Christeson's rights to due process, freedom from cruel and unusual punishment, and equal protection and counsel was ineffective. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976). It is of vital importance that a death sentence be, and appear to be, based on reason rather than caprice or emotion. *Gardner v. Florida*,430U.S.349,357-58(1977). Discretion given to sentencers in death penalty cases must be suitably directed, limited and channeled to minimize the risk of wholly arbitrary and capricious action. *Gregg v. Georgia*,428U.S.153,189(1976). While clemency procedures are largely committed to the discretion of the Executive Branch, the Due Process Clause provides some constitutional safeguard to wholly arbitrary and capricious action. *Ohio Adult Parole Authority v. Woodard*,523U.S.272,288-90(1998)(O'Connor, J., concurring). Due Process requires that the procedures used in rendering a clemency decision "will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin." *Duvall v. Keating*,162F.3d1058,1061(10thCir.1998) *citing Woodard*,523U.S. at 289(O'Connor, J., concurring). The use of criteria such as religion in deciding whether to grant or deny clemency violates the commands of the Equal Protection Clause. *Woodard*,523U.S. at 292(Stevens, J., concurring and dissenting).

Darrell Mease was convicted and sentenced to death for acts resulting in a triple homicide. *State v. Mease*,842S.W.2d98,102(Mo.banc1992). Governor Carnahan commuted Mease's death sentence to life (Ex. 48). The commutation was granted because the Pope personally and directly asked Governor Carnahan to do so (Ex. 48). Governor Carnahan granted the Pope's request because of his

"deep and abiding respect" for him "and all that he represents" (Ex. 48). Counsel did not consider opposing respondent obtaining a death sentence against Mr. Christeson based on the arbitrariness of the clemency process (Sept.R.Tr.366-67).

The motion court denied Mr. Christeson's claim, based on Mease's commutation(R.L.F.940), stating that this Court had previously rejected this claim and cited *State v. Simmons*,955 S.W.2d752,771(Mo.banc1997).

The grant of clemency to Mease establishes the arbitrary and capricious nature of Missouri's clemency process. The Governor commuted Mease's death sentence because of the Pope's personal appeal, not because of any specific factors in Mease's case that warranted a punishment reduction. While Mr. Christeson does not presently have an execution date and has not been denied clemency, he is required to present his constitutional claims challenging this State's clemency proceedings to this State's courts. For that reason, the claim is ripe and relief should be ordered.[3] Further, reasonably competent counsel under similar circumstances would have objected and Mr. Christeson was prejudiced because this arbitrariness required a life sentence. *See Strickland*. Because

[3] This Court has previously rejected a similar claim on ripeness grounds, but not in the case the motion court cited. *See Middleton v. State*,80S.W.3d799,817(Mo.banc2002). For the reasons discussed, this claim is ripe and *Middleton* should not be followed.

Missouri's clemency proceedings are wholly arbitrary and capricious, this Court should order Mr. Christeson be sentenced to life without parole.

XVII. JURORS DO NOT UNDERSTAND THE PENALTY INSTRUCTIONS

The motion court clearly erred in rejecting the claim that Mr. Christeson was denied his rights to effective assistance of counsel when counsel failed to present evidence to challenge the penalty phase jury instructions on the grounds that they fail to properly guide the jury as well as rejecting his claim that his rights to due process, a fair and impartial jury, and to be free from cruel and unusual punishment were violated when those instructions were given because Mr. Christeson was denied those rights, U.S. Const. Amends. VI, VIII, and XIV, in that the evidence presented established jurors do not understand the instructions and counsel unreasonably failed to present evidence to support a challenge and Mr. Christeson was prejudiced because the less jurors understand, the more likely they are to impose death.

The penalty phase instructions failed to properly guide the jury. Yet counsel did not challenge them with any supporting evidence. Mr. Christeson was prejudiced because jurors who do not understand those instructions are more likely to impose death. Mr. Christeson was denied his rights to effective counsel, due process, a fair trial, a fair and impartial jury, and to be free from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence

reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

Sentencing someone to death is cruel and unusual punishment if the punishment is meted out arbitrarily and capriciously. *Furman v. Georgia*,408U.S.238(1972). The trial and sentencing phases of a capital case must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*,430U.S.349,358(1977).

Prior to trial, counsel filed motions challenging the MAI penalty phase instructions (T.L.F.95-103,129-36,337-45). Counsel had no reason, however, for failing to call Dr. Wiener to testify about his findings that jurors do not understand the Missouri penalty phase instructions (Sept.R.Tr.286). Counsel was aware of Dr. Wiener's study and had called him in the past to testify about his study (Sept. R.Tr.286).

The motion court rejected all grounds for this claim (R.L.F.939-40), relying on this Court's decision and criticisms of Dr. Wiener's work in *State v. Deck*,994S.W.2d527,542-43(Mo.banc1999).

Dr. Wiener studied and analyzed the MAI form penalty phase instructions and the specific instructions that were given in Mr. Christeson's case (Ex. 55 Affid. at 2). He studied jurors' understanding of the Missouri penalty phase instructions (Ex. 55 Affid. at 2). That study was done in conjunction with the Missouri Public Defender System and made available to the Missouri Public Defender on February 1, 1994 (Ex. 55 Affid. at 2). That study found that jurors

overall do not understand the Missouri penalty phase instructions and those jurors who do not understand the instructions are more likely to impose death than those who comprehend the instructions (Ex. 55 Affid. at 2). Professor Wiener also found that it was possible to improve juror comprehension through rewriting the penalty phase instructions in language that lay people understand (Ex. 55 Affid. at 2). The study was published as Richard Wiener, *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, Journal of Applied Psychology, 455-67(1995) (Ex. 55 Affid. at 3).

In *United States ex rel. Free v. Peters*,806F.Supp.705(N.D.Ill.1992),*rev'd*.12F.3d 700(7thCir.1993) a study of the Illinois penalty phase instructions was conducted and concluded that jurors did not understand those instructions. The Seventh Circuit reversed the granting of relief to the petitioner based on its view that the study was deficient in certain respects. Professor Wiener's study was free of the problems that the Seventh Circuit had identified as to the study in *United States ex rel. Free v. Peters* (Ex. 55 Tr. at 81-84).

Based on Professor Wiener's review of the penalty phase jury instructions in Mr. Christeson's case, he concluded, to a reasonable degree of scientific certainty, that juror comprehension would have been no better than found in his study (Ex. 55 Affid. at 3).

Dr. Wiener also addressed the criticisms this Court directed at his study in *State v. Deck*,994S.W.2d527,542-43(Mo.banc1999). In *Deck*, this Court criticized

Dr. Wiener's study because those who participated in his study were not jurors who deliberated on the facts of Deck's case. *Id*.542-43. Dr. Wiener indicated that this Court's criticism is not a valid one because researchers who have studied the same issues in other states have consistently found that penalty instructions presently in use are difficult for jurors to comprehend and generate substantial confusion (Ex. 55 Tr. at 80-81). Dr. Wiener noted that the research literature in the field has shown that deliberation does not improve jurors' understanding of penalty instructions (Ex. 55 Tr. at 82-84).

Dr. Wiener recently completed a new study that was funded by the National Science Foundation (Ex. 55 Tr. at 83-84). That study had 711 death qualified Missouri residents participate (Ex. 55 Tr. at 84). In Dr. Wiener's most recent study, these individuals watched a condensed videotape reproduction from a recently tried Missouri death penalty case (Ex. 55 Tr. at 84-85). The study participants deliberated as jurors (Ex. 55 Tr. at 84-85). The study found that deliberation had little impact on jurors' comprehension of penalty instructions (Ex. 55 Tr. at 84-86). This most recent study came to the same conclusion as the 1994 study - there is low comprehension of the Missouri penalty instructions (Ex. 55 Tr. at 84-86). Once again Dr. Wiener found that for those juries for which comprehension was low there was an increased likelihood the death penalty would be imposed (Ex. 55 Tr. at 85-86). Again, Dr. Wiener found comprehension would be improved through simplifying the instructions' language (Ex. 55 Tr. at 86). Dr.

Wiener's National Science Foundation study was accepted for publication in the Journal of Psychology, Public Policy and Law (Ex. 55 Tr. at 87).

Professor Wiener was not contacted, prior to Mr. Christeson's trial, by his attorneys and he was willing and able to testify about his study's findings (Ex. 55 Affid. at 4).

The motion court's findings are clearly erroneous. Dr. Wiener's 1994 study and more recent National Science Foundation study both concluded there is poor juror comprehension and that poor juror comprehension increases the likelihood of a death verdict (Ex. 55 Tr. at 75-81,84-86). This Court's prior criticisms simply are not scientifically valid for the reasons Dr. Wiener explained. Dr. Wiener's replication of his 1994 study findings in his later National Science Foundation study is relevant to counsel's ineffectiveness because the later study arrived at the same conclusions and disproved the criticisms this Court had made of the 1994 study. Thus, the later study establishes that counsel's failure to rely on the 1994 study was unreasonable.

Reasonably competent counsel who filed motions challenging the penalty phase instructions and who was aware of Professor Wiener's study would have presented evidence of that study to support their motions. Mr. Christeson was prejudiced because the jurors did not understand the penalty phase instructions submitted in his case. Not only was Mr. Christeson denied effective assistance of counsel, but also he was denied his rights to due process, a fair trial, a fair and impartial jury, and to be free from cruel and unusual punishment.

This Court should order a new penalty phase.

CONCLUSION

Mr. Christeson requests: Points I, III, IV, IX, X, XII, a new trial or at minimum a new penalty phase; Point V a new trial; Points II, VI, VII, XI, XIII, XVII a new penalty phase; Points XIV, XV, XVI impose life in prison without parole; and Point VIII a new 29.15 hearing before a judge with authority to serve.

Respectfully submitted,

_____

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Certificate of Compliance and Service

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains _____ words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in December, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were _____ this _____ day of December, 2003, to Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

_____
William J. Swift